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PERMISSION FOR SEPARATION AND DIVORCE *

THE subject of this review is treated in Chapter X, *De separatione coniugum,* Article II, *De separatione tori, mensae et habitationis,* of the *Code of Canon Law,* Canons 1128-1132.

The matter of handling problems of separation and of at times permitting subjects within one's jurisdiction to apply for a civil divorce is frequently presented to Chancery officials and I dare say the number of such cases has greatly increased. Although the number of cases referred to the Chancery may be great, it is probably but a minor portion of the cases in which Catholics are involved in civil suits for separation and divorce. The wide spread decay in morals and the insidious infection of the bad example of others, especially public figures, who have obtained divorces, and the perversion of natural justice in the law courts have contributed to the laxity of our Catholic people. It goes without saying that public opinion on separation and divorce has so radically changed that one so involved never feels the censure and stigma formerly and deservedly attached to divorced parties. Consequently many Catholics obtain civil judgments of separation and divorce without ever feeling obliged in conscience to refer the question to ecclesiastical authority. Undoubtedly many do not even present the case to a confessor. Perhaps our people have not been well enough instructed in this matter.

* Paper read by the Very Reverend Hugh G. Quinn, J.C.D., Chancellor, Diocese of El Paso, at the Southwestern Regional Conference Meeting of The Canon Law Society of America, held in Santa Fe, New Mexico, September 29 and 30, 1953.

To cover the subject briefly we shall consider the law as it relates to (1) the obligation of communal life, (2) separation and recognized causes, (3) curial procedure, (4) remedies.

(1) The Obligation of Communal Life

Canon 1128 is clearly a dogmatic canon and obliges spouses to lead a communal life unless a just cause should excuse them. This is fully treated by moral theologians. Canonists are concerned with the interpretation of the just cause when non-observance of communal life becomes a legal problem presented to a Curia for adjudication. In this latter event, the question must be treated as one affecting the common good and the preservation of good order in society.

(2) Separation and Canonical Causes Thereof

Separation may be (a) total or partial, (b) temporary or perpetual. Total separation includes separation from bed, board and cohabitation, partial separation as is evident may pertain to one or two of these obligations. The meaning of temporary or perpetual separation is evident.

The causes which may justify partial separation are more the concern of the moralist than of the canonist. The causes for total separation, temporary or perpetual are the concern of the canonist. It is true nevertheless that the canonist may deal with even partial and temporary separation as may be the case when one party feeling unjustly treated by the neglect of marital obligations appeals to the authority of the Church to induce a spouse to fulfill his part of the marriage contract. As a general rule this recourse to ecclesiastical authority is to the local pastor or confessor.

The perpetual release from the obligations of the marriage contract demands more grave reasons than for a temporary release. The reasons must be proportionate to the obligation from which one seeks release. That there be a just cause of necessity is seen in Canon 1013 § 1 on the ends of marriage.

PERPETUAL SEPARATION

Perpetual separation is a right [1] but not an obligation of an innocent spouse when adultery or similar heinous crime (e.g., bestiality, sodomy) is the cause. The crime must be the formal, consummated sin of adultery, its commission morally certain, neither permitted, nor compensated by the same crime of the other party nor condoned. Condonation of the crime of adultery may proceed from generosity, longanimity or through bestowing the ordinary signs of martial affection by the innocent party who has knowledge of commission of the crime.

One is presumed to have given tacit condonation if no action (dismissal, desertion or denunciation) has been instituted within six months (*tempus utile*) after learning of the crime.[2]

Should the crime be certain but occult the aggrieved party has the right of dismissal but only in the forum of conscience since charity demands that scandal and defamation be avoided. Otherwise the accused could institute suit for restoration of cohabitation. In this case duty is proved and certain while the right of separation is not.[3]

The certainty is determined by various modes. Frequently the crime is determined by what one canonist terms "*presumptiones violentes.*" [4]

In a separation legitimately effected by private authority, the presumptions must be founded on a certain judgment. In a judicial or administrative procedure, the crime must be established by means of juridical proof.[5]

[1] Coronata states that some authors (unnamed) hold that an innocent party is obliged to separate if this be necessary for correction or the reparation of scandal. *Institutiones Iuris Canonici, De Sacramentis,* Vol. III (Taurini: Marietti, 1946), p. 917.

[2] Doheny, *Canonical Procedure in Matrimonial Cases,* Vol. II, *Informal Procedure* (Milwaukee: Bruce, 1944), p. 628 (cited *Informal Procedure*).

[3] *Ibid.,* p. 629.

[4] Coronata, *op. cit.,* III, p. 918.

[5] *Loc. cit.*

Ignorance of the adultery is not presumed if the crime be notorious. This however is a *presumptio iuris simpliciter.*[6]

An innocent party may be said to have given consent or permission to a partner's adultery when he fails to impede what he could easily prevent. This of course may be more applicable to husbands than to wives. It is usually easier for a husband to prevent his wife's adultery than vice versa. (*servata servandis*!)

Should one be the culpable cause of a spouse's infidelity, he would not have the right of separation. One would be the direct cause were he to command, compel or provoke the adultery. One may be the indirect cause were he to withdraw maintenance, deny the *debitum* or expel the spouse from the home and so be the occasion of the adultery. According to Coronata, although this is admitted by some authors, (e.g., Gasparri) the more common opinion does not admit this.[7]

If the adultery of one party is compensated by the adultery committed by the other before the separation, neither enjoys the right of separation. If, after a legitimate temporary separation the hitherto innocent party commits adultery, he can be forced to resume cohabitation,[8] or the other spouse can ask for permanent separation.[9]

TEMPORARY SEPARATION

Concerning the duration of temporary separation, the *Code of Canon Law* [10] uses the expression "*ad certum incertumve tempus*" whereas the Instruction "*Provida*" uses the expression "*ad tempus indefinitum*".[11]

[6] Regatillo, *Ius Sacramentarium* (2. ed., Santander, 1949), p. 854.

[7] Cf. Coronata, *op. cit.*, III, p. 919. Authors listed as holding this more common opinion are Wernz-Vidal, Chelodi, Cappello, Vlaming, Ballerini-Palmieri.

[8] Coronata, *op. cit.*, III, p. 921.

[9] Regatillo, *op. cit.*, p. 858.

[10] Can. 1131, § 2.

[11] Art. 6, § 2.

A wife legitimately separated from her husband acquires her own domicile or quasi domicile, and for judicial matters can be cited by the ordinary of the place of her domicile or quasi-domicile or of the place of contract. "Presumably," according to Doheny, "if the sentence of separation specified a definite period of time, it would not permit the wife to have the intention of remaining permanently in the same place in order to enable her to acquire her own domicile.[12]

Causes for Temporary Separation

1. Affiliation with a non-catholic sect., i.e. formal ascription to a non-catholic sect.[13]

2. Insistence on the non-catholic education of children: On this point, Doheny rightly remarks that if separation is the sole efficacious means to protect the children against non-catholic education, separation is not only licit but obligatory.[14] This, however, may be the rare case.

3. Criminal and disgraceful life; e.g., alcoholism.

4. Danger to body and soul: such would be the case if cohabitation were the occasion of repeated temptations to serious sins against conjugal chastity, of constant ridicule of the faith or if a spouse were afflicted with serious and repulsive contagious disease.[15] However, Coronata opines that in this last condition total separation is not to be permitted, since separation *a toro* suffices.[16]

5. Unbearable cruelty. Usually but not "*semper et pro semper,*" the wife is the victim. This of course could be

[12] *Canonical Procedure in Matrimonial Cases,* Vol. I, *Formal Judicial Procedure* (Milwaukee: Bruce, 1938), p. 25. (Cited *Formal Procedure.*) Cf. also Doheny, *Canonical Procedure in Matrimonial Cases,* Vol. II, *Informal Procedure,* p. 649.

[13] Coronata, *op. cit.,* III, p. 922.

[14] *Informal Procedure,* p. 633.

[15] *Ibid.,* pp. 633-4; Ramstein, *The Pastor and Marriage Cases* (3. ed., New York: Benziger, 1945), p. 245.

[16] *Op. cit.,* III, p. 923.

mental or physical cruelty. Even cruelty inflicted by one's in-laws would be a just cause.[17]

6. Other similar causes; the list as given in Canon 1131 § 1 is not taxative.[18]

Coronata gives as explanations or examples of *saevitia* the following; *gravia mala, minae, iurgia, rixae, convicia, contumeliae,* all of which must be judged in the light of the natural dispositions of the persons.[19]

However if these are provoked, then the provocator upon whose head they descend, does not enjoy the right of seeking separation.[20]

(3) Curial Procedure

COMPETENT AUTHORITY

By reason of the Church's being a perfect society and having exclusive competence over the Sacrament of Matrimony, her jurisdiction governs not only the question of separation but also the consequent effects, as for example, the restoration of dowry, the division of temporal communal goods, provision for adequate support "*habita ratione circa haec legis civilis.*" At times the Holy See has tolerated the provision by which causes of separation have been defined by civil judges, e.g., in England and France. This toleration according to some (Coronata mentions Cappello) has been extended to other countries; others (among them Gasparri) deny this extension.[21]

There exists an apparent discrepancy between the *Code of Canon Law* and the Instruction "*Provida*" in enumerating the authorities who can effect a divorce. The Instruction [22]

[17] Doheny, *Informal Procedure,* p. 635.

[18] Conc, Trident., sess. 24, can. 7; Doheny, *Informal Procedure,* p. 635; Coronata, *op. cit.,* III, p. 922.

[19] *Op. cit.,* III, p. 923.

[20] Regatillo, *op. cit.,* p. 855.

[21] Coronata, *op. cit.,* III, p. 924.

[22] Art. 6, § 2.

seems to imply that the only legitimate means of separation are either a judicial decree or a decree of the ordinary while canon 1131, § 1, definitely states that separation can be effected on the authority of a spouse himself, the necessary conditions prevailing. This provision of the Code has in no wise been abrogated by Art. 6, § 2, of the Instruction.[23]

The competent authorities to effect a separation are the ordinary (or his vicar general), the *officialis,* the innocent party.[24]

MODE OF PROCEDURE

In ecclesiastical tribunals, cases of separation may be handled administratively, or judicially at the instance of the parties or if the ordinary should so decree.[25]

In practice, at least in this country, the administrative procedure is used.[26]

Perhaps it will not be amiss to give a brief outline of a suggested administrative procedure tracing the case from the beginning. Although the very beginnings usually are dealt with by the confessor or pastor and do not strictly pertain to curial procedure, it may be well to discuss these points for our aim is not only to discuss canonical questions but also to

[23] Doheny, *Formal Procedure,* p. 25.

[24] In this connection it should be noted that the Code gives to the spouse the right to effect a temporary separation, but not the right to obtain a civil divorce. Ramstein, *op. cit.,* p. 245. Even in the case of adultery, which is grounds for a permanent separation, the innocent party on his own authority can effect the separation as long as the delict is certain. It is, of course, more proper to refer the case to the ordinary. If the delict be certain but occult, the innocent party can effect the separation on his own authority according to what Coronata labels the more common and more probable opinion. *Op. cit.,* III, pp. 920-921.

[25] Pont. Com., 25 iun. 1932.—*AAS,* XXIV (1932), 284. Bouscaren-Ellis, *Canon Law: a Text and Commentary* (Milwaukee: Bruce, 1945), p. 572.

[26] Wanenmacher claims that in cases of perpetual separation strict judicial procedure should be used.—*Canonical Evidence in Marriage Cases* (Philadelphia: Dolphin Press, 1935), p. 5. At present this is an impossibility for most Curias. For several pertinent observations of strict judicial procedure in causes of separation, this work should be consulted.

exchange advice and suggestions for the more efficient administration of our respective curias and the bettering of observance of Christian norms of morality within our dioceses.

In the Sacramental Forum, the confessor should not readily advise nor easily permit separation (especially since his judgment is founded on the sole authority of the penitent) save for any but the gravest causes.[27]

The confessor or pastor should not easily believe women when they claim to be the victims of extreme harshness and severity.[28] Separation should be used only as a last remedy.[29]

Frequently, proper pastoral solicitude can do much to restore peace and harmony in a disturbed household within a parish. Perhaps in former days people used to refer such problems to their priests more often than they do now. But it still remains the obligation of the pastor to correct and counsel the errant. Much good may be done by judicious and prompt solicitude. If disharmony and disturbances are allowed to build up to the breaking point, much harm to the Church, family and society can ensue.

This failing and there being no other recourse but to ask for a separation, the pastor should refer the case to the ordinary through the Curia. At times a priest may discover that the parties have already separated. Bouscaren-Ellis state that if the parties are unaware of their obligation to refer the matter to the ordinary and if there is no great consequent scandal it is well not to insist on the obligation of referring the matter to the ordinary.[30]

Ramstein, however, takes a stricter view. The confessor should grant absolution only on condition that the penitent either restore the common life or submit the case to the ordinary. If a civil divorce has already been obtained, absolution should be denied unless the penitent promises to seek episcopal approval. The confessor must also look to the safeguards

[27] Bouscaren-Ellis, *op. cit.*, p. 573.

[28] Regatillo, *op. cit.*, p. 858.

[29] *Loc. cit.*

[30] *Op. cit.*, p. 573. Cf. Regatillo, *op. cit.*, p. 858.

and promises for the spiritual welfare of the children and the preservation of conjugal chastity by the penitent. This he says, adds to the penitent's peace of conscience and satisfies the Catholic sense of propriety.[31]

Nevertheless the confessor must bear in mind the principles governing leaving a penitent in good faith.

In referring a case to the Curia, the pastor should state:

(a) the names, addresses, ages, religion, occupation of the spouses and the date and place of the marriage;

(b) a sufficiently detailed description of the charges;

(c) indication of proof (e.g. letters, names of witnesses);

(d) whether he has attempted to reconcile the parties; whether he has interviewed the accused, or his reason for not doing so;

(e) whether the petitioner is a Catholic in good standing and worthy of credence;

(f) the number of children and their ages;

(g) whether the accused be likely to contract a second marriage or otherwise morally suffer; [32]

(h) whether the charges are public knowledge.

This should be signed by the pastor.

The complainant will state why reconciliation is impossible; that the divorce (if permission to obtain a divorce is being requested) is desired solely for the civil effects; that a second marriage will not be attempted; that "company keeping" will be avoided. This should be affirmed by oath, signed by the party, dated and attested to by the pastor.[33]

This same information is applicable to the cases in which parties may seek permission to obtain a civil divorce. A divorce may be necessary to protect property rights,[34] to obtain support, be free from molestation.[35]

[31] *Op. cit.*, p. 249.

[32] Cf. Coronata, *op. cit.*, III, p. 926.

[33] Ramstein, *op. cit.*, p. 248.

[34] Doheny, *Informal Procedure*, pp. 635-6 and 650.

[35] Ramstein, *op. cit.*, p. 246.

Permission for civil divorce may be given after permission for indefinite separation or simultaneously, e.g., in those states which do not recognize separation but only absolute divorce. The III Plenary Council of Baltimore levelled a penalty against those who obtain a civil divorce without ecclesiastical approval.[36] This penalty is a *"ferendae sententiae"* penalty. If those who have been legitimately separated and have been given permission to obtain a civil divorce, attempt another marriage they incur the penalty of excommunication *"latae sententiae"*.[37] Besides being excommunicated they would also become *ipso facto infames*.[38] In some dioceses of the United States, suing for a divorce without proper ecclesiastical sanction is made a reserved sin.[39] In some states the divorce laws may be so lax and the procedure so hasty that to preserve civil rights a spouse may have to file for divorce without obtaining the Ordinary's permission. Because of the evils which so often follow even bona fide divorce, some Bishops seldom permit their subjects to obtain a civil divorce.[40]

Effects of Separation and Divorce

1. Domicile. A wife legitimately separated from her husband can acquire her own domicile or quasi-domicile. A Catholic wife unlawfully separated from her non-Catholic husband can cite him before the Ordinary of her own proper and distinct quasi domicile or before the Ordinary of the domicile of her husband.[41]

2. Custody of the children. (a) If both parents are Catholic, the care of the children is to be given to the innocent party; (b) if one party is a Catholic, the children are to be

[36] Decree n. 126.

[37] III Plen. Council of Baltimore—Decree n. 124.

[38] Canon 2356.

[39] Ramstein, *op. cit.*, p. 247.

[40] Ramstein, *op. cit.*, p. 250.

[41] Pont. Com., 14 iul. 1922.—*AAS*, XIV (1922), 530.

given to the Catholic party, unless (c) the Ordinary decree otherwise.[42]

Here a difficulty may be encountered with the civil law. In granting a divorce decree, a civil judge will award custody according to the statutes. Bouscaren-Ellis observe that state laws which directly or indirectly deprive Catholic children of Catholic education are against the natural law and Catholics should exercise all legal means to obtain custody of the children.

The date of separation or divorce may enter into the question of the legitimacy of a child.[43]

PRAXIS CURIAE

A few decisions of the Holy See may indicate the mind of the Holy See in regard to permission to obtain civil divorce. In 1887 the Sacred Penitentiary rejected a request for such a divorce in order to obtain a government job necessary for livelihood.[44] The answer of the Holy See was that the person should refrain from seeking a divorce under pain of serious sin. In 1891 the Holy See gave a similar answer, although the petitioner who would otherwise undergo serious consequences was properly disposed.[45] In 1891 the Holy See rejected a request for permission to obtain a civil divorce to provide for the religious education and support of an orphaned granddaughter.[46] In 1892 the Sacred Penitentiary replied to a man legitimately separated who requested the divorce permission for its civil effects that he "seek the advice of approved moralists".[47]

[42] Canon 1132.

[43] Canon 1116. Cf. Manning, *Presumption of Law in Marriage Cases*, The Catholic University of America Canon Law Studies, No. 94 (Washington, D. C., 1935), 92.

[44] Casey, "Decisions of the Holy See," *Canon Law on Civil Action in Marriage Problems* (Chicago: Catholic Lawyers Guild, 1944), p. 63.

[45] *Loc. cit.*

[46] *Loc. cit.*

[47] *Loc. cit.*

Insanity was considered grounds for a separation for 5 years. An appeal to obtain permanent separation was rejected.[48]

(4) Remedies against Separation and Divorce

There are two admirable means to lessen the number of applications for separation and divorce.[49] The first of these is the organization of marriage counselling courses in a diocese, and the formation of Cana Conferences. Several of the Catholic Universities have inaugurated short workshops or summer sessions in this field. It should be fairly easy for a diocese to plan for the adequate training of a few clerics who could form a nucleus of trained personnel. In every diocese there are already some clerics whose basic training admirably fits them for beginning the work locally. Such would be those trained in Canon Law, Social Welfare and Education. If an ordinary could send one young cleric each year to one of the above mentioned workshops, there would be a highly trained corps of suitable personnel. One should not forget the availability of the professional laity, doctors, nurses and lawyers. Perhaps a Cana Conference in several centers of the diocese would provide an effective beginning. It surely would not be out of place that a clerical conference be devoted solely to this problem. Though our clerics are well trained in moral theology, unfortunately some are remiss when it comes to marriage counselling, either as preparatory to a marriage or in fulfilling

[48] Doheny, *Formal Procedure*, p. 535; *S.R.R. Decisiones seu Sententiae*, XVIII (1926), p. 190, n. 5.

[49] It should be noted that in some dioceses the problem of permitting civil divorce is greater than in others, for some states do not provide for separate maintenance and provide only for absolute divorce. In addition, the ease with which a spouse delinquent in furnishing support, whether during marriage or after a decree of divorce, can put himself beyond the law enforcement authorities by removing himself from their jurisdiction often compels curial officials to grant permission for divorce so that a wife may obtain some support through a division of communal property. The number of such instances is so great as to make it impossible for even conscientious civil authorities to take necessary steps to apprehend the delinquent and to force him to contribute to the support of his wife and family.

pastoral duties when couples within a parish are experiencing difficulties in maintaining marital peace and harmony.

A proper course of sermons on matrimony might be issued within a diocese. This course, I think, should stress the holiness and dignity of marriage as a means of divine grace.

A second great remedy or antidote to offset the present evils would be the formation of a Catholic Lawyers Guild. The positivism which is the great legal heresy of the day and which has infected even Catholic attorneys is in no small way responsible for the decline in marital fidelity and fulfillment of the obligations of justice. The ease with which the marriage bond is severed under the prevalent laxity has led not only to the lowering of the moral standards, but also to perjury, juvenile delinquency, deprivation of the child's right to the supervision and love of both parents.

Attorneys, including some Catholics, seem to make no efforts at effecting reconciliation of the parties. Professional ethics hinder few from accepting any and every divorce case which comes to them. The acceptance of a fee seems to be the sole norm, for many seem to be unaware of that basic principle that "law is designed to promote all the virtues and not to accommodate itself to the criminal or to cater to the weak." And in too easily accepting divorce cases, an attorney neglects his obligation to protect the common good.

Then, too, attorneys rarely seek advice or counsel on whether they can conscientiously accept a divorce case or whether the local curia has given permission for a divorce. To many it would make little difference whether the curia had refused permission. For a Catholic attorney, when permission to obtain a divorce is denied by the ordinary, the stricture of the Gospel should be a guiding norm: "If he refuse to hear the Church, let him be to thee as the heathen and the publican" (Matth. 18:17.).

A Guild of Catholic Lawyers would do much to raise the level of legal divorce practice in each locality. Through it at least the Catholic attorneys would be aware of the perni-

cious influences and effects of divorce as outlined in the celebrated encyclical "*Casti Connubii*" issued in December, 1930:

a. The present precarious state of marital life brought about by the fear of eventual separation and divorce.

b. The lessening of mutual affection occasioned by this same fear that some day the union might come to an end.

c. More danger of infidelity for the same reason.

d. Serious detriment to the birth and education of children.

e. The door is more easily opened to discord and wrangling than it would otherwise be if divorce and separation were an impossibility.

f. The dignity of woman is lowered by the danger she will be discarded once she has ceased to be an instrument of man's passions.

g. The disintegration of the family, and, as a consequence, of the state.

Catholics in the legal profession need to be reminded that "the Church has very diligently watched over this Sacrament to preserve it from all the abuses that human nature and its weakness entails. In every century we see evidence of the solicitude of the Roman Pontiffs that marriage remain on a high pedestal designed for it by Christ. For that reason the Church has always strenuously insisted that the parties remain together in common marital life, and has fought a tireless campaign against divorce and separation. The Church was fully aware that its legislation was bound at times to work hardship against the people. But true to the concept that marriage is a sacrament that belongs and pertains to society, the Church understood that such hardships were to be sustained by the parties for the common good." [50]

[50] Burke, "The Problem," *Canon Law on Civil Action in Marriage Problems*, p. 13.

BROTHER-SISTER ARRANGEMENT IN INVALID MARRIAGES *

BECAUSE of the laxity of morals caused by secularistic and pagan influences at the turn of this century and particularly after World War I, Our Holy Father, Pope Pius XI, in his encyclical on Christian marriage clearly pointed out the dangers in regard to the sacrament of matrimony, and exhorted active participation in the campaign against these trends. Our bishops, realizing the seriousness of the situation in this country, have supplied the necessary leadership in the defense of the divine plan for marriage. Aware of the pagan notions concerning the concept of marriage, they have detailed plans to restore order and respect for the divine principles relative to home and family life. In pastoral letters they have stressed the potential danger of the divorce evil, condemning it as a sign of moral decay, and warning that, unless effective steps are taken to counteract the evil, it would develop not only into a national scandal, but, more than any single factor, could contribute to the downfall of our civilization.

In the Catholic Action program encouraging progress has been made. The proposed measures are working out successfully on a national scale in such organizations as the Family Life Bureau of the National Catholic Welfare Conference, which constitutes a splendid constructive program in defense of the sanctity of marriage and the unity of family life. Every possible means of communication, radio, press, study clubs, and the various diocesan and parish organizations are utilized in furtherance of the aims outlined in the program.

In spite of all efforts the divorce trend has reached alarming proportions, which is understandable in view of the secularistic surroundings in which we live. It is to be expected

* Paper read by the Reverend James P. Godley, J.C.D., at the Mountain States Regional Conference Meeting of The Canon Law Society of America, held in Pueblo, Colo., on October 12, 1952.

too that, since one out of every four marriages ends in divorce, some Catholics will be involved in the resulting bigamous unions. Such Catholics, victims of the popular divorce fallacy, later come to a realization of their sinful plight and look in all directions for help in the long journey back to God. Very often their first approach is greeted with the demand for a complete separation, which in some cases cannot be accomplished without extreme hardships and difficulties, consequent for example upon the existence of a large family of young children, on the presence of some grave illness, on the publicizing of an invalid marriage hitherto unknown, etc.

Since the divine mission of the Church is the salvation of all souls, every consideration should be afforded the strays who seek re-admission to the fold. However, in any dealing with the individuals involved in a bad marriage, the good of the community must be safeguarded, lest by scandal others be encouraged to risk their salvation through similar recklessness in marriage. The delicate and serious nature of this problem is very evident both in theory and in practice. Canonists and theologians alike warn that the brother-sister arrangement is dangerous (*res plena periculis*), and should practically never (*fere numquam*) be allowed. Consequently there is a tendency to regard this permission as something altogether impractical. The fact remains that the arrangement is available as a solution in particular cases, and, as priests devoted to the cause of the salvation of souls, we are bound to use every available means toward that end.

There is nothing new in the brother-sister arrangement, but the current enormous number of divorces and remarriages have increased the number of applications for the permission. The subject is very important not only for chancery officials, but also for parish priests and confessors. The literature on the subject is very limited. Monsignor John Król of the Diocese of Cleveland [now one of its auxiliary bishops] has set the pattern in a paper read in New York, October 11, 1950. The present writer has followed the plan there suggested and

now operative in the Diocese of Cleveland. Strange silence on the methods used in other dioceses seems to be the order of the day, and very few follow a set form for the process.

The present writer wishes to express sincere appreciation to Monsignor Król for using his paper and the procedure suggested therein. It is hoped that the practical rules of procedure will be of some use to the chanceries, priests and confessors throughout this region, and also will stimulate discussion on whatever improvement of the method may seem feasible.

Principles Involved

Remedies for an invalid marriage. Prescinding from the causes for invalidity, one sees five possible approaches to the problem of an invalid marriage. The first is its convalidation through a renewal of consent or, in extraordinary cases, through a *sanatio in radice.* The second is to allow the couple to remain in good faith, which solution is possible only when the invalidity is incurable, but in connection with a putative union is unknown to both parties. The third and normal procedure in regard to an incurably null marriage is to demand a complete separation upon a declaration of nullity. The fourth is to investigate the possibilities of a declaration of nullity or of the dissolution of a previous marriage. The fifth, which obtains only as a last resort, is to allow the parties to live together as brother and sister.

The first remedy creates no problem, since it can be used with the minimum of delay. In any case the parties must be enjoined to separate—at least *quoad torum*—until the marriage has been convalidated. The second and third remedies have no bearing on the present subject. The last two constitute the core of the matter at hand, since they directly involve either a temporary or a permanent brother-sister arrangement.

Convalidation by way of Pauline Privilege. A temporary brother-sister arrangement is practically inevitable in certain Pauline Privilege cases. An evident example is the following:

John, a non-Catholic, divorced his non-Catholic wife and

attempted marriage with Mary, a Catholic. Later he wishes to become a Catholic and to have his marriage convalidated. Convincing evidence of his non-baptism is furnished. He receives the necessary instructions and asks to be baptized. Because of the children who are still in their minority, in view of the existing lack of funds, and in consequence of the danger of exposing the occult invalidity of his marriage, he refuses to separate from Mary. Unless he is baptized, he cannot qualify for the Pauline Privilege. The pastor prudently hesitates to baptize John, who seemingly is living in a proximate occasion of sin.

The Pauline Privilege certainly cannot be applied to catechumens; it can be applied only to those who are converted and baptized. This is evident from a response given by the Sacred Congregation for the Propagation of the Faith on January 16, 1803.[1] Canon 1121, § 1, requires that baptism precede the interpellations, though for grave reasons permission has been granted for an inversion of this order or sequence. Normally, however, the baptism of the petitioner is a prerequisite for the completion of this phase of the case.

Thus the reception of baptism is required by law. Hence, the one hope for completing a Pauline Privilege case and for convalidating the marriage is the baptism of the petitioner. It is reasonably assumed that parties in bad marriages live in a proximate occasion of sin. Since the sacraments must be denied to those who refuse to avoid a voluntary proximate occasion of sin, the hope for baptism attends only such cases wherein the occasion of sin is neither voluntary nor proximate.

Baptism of an invalidly married person. The sacraments must be denied to a person who refuses to avoid a voluntary proximate occasion of sin, as is evident from the proposition which was condemned by Pope Innocent XI: "*Potest aliquando absolvi, qui in proxima occasione versatur quam potest et non vult deserere, quin imo directe et ex proposito quaerit*

[1] *Codicis Iuris Canonici Fontes*, cura Emi Petri Card. Gasparri editi (9 vols., Romae [postea Civitate Vaticana]: Typis Polyglottis Vaticanis, 1923-1939 [Vols. VII-IX, ed cura et studio Emi Iustiniani Card. Serédi]), n. 4671.

aut ei se ingerit." [2] For the lawful reception of baptism, canon 752, § 1, requires contrition, or at least attrition for all mortal sins. The Council of Trent in defining contrition as " a sorrow and detestation for sin committed, with a purpose of sinning no more " made it clear that the purpose of avoiding sin in the future is an indispensable requisite for contrition.[3] It is agreed by all theologians that the firm purpose of avoiding sin must extend to the avoidance of the proximate occasion of sin. There are two schools of thought on the question of what constitutes a proximate occasion of sin, and of the corollary of determining the gravity of the obligation of avoiding the single occasion of sin.[4] All agree that one has a serious obligation of avoiding the voluntary occasion of sin in which one often sins mortally.[5]

On this point Ayrinhac (1867-1930) wrote: " Real attrition would not exist in a catechumen who would not manifest willingness to obey all the laws of God and of the Church, to give up superstitious practices, dismiss an illegitimate wife, ..." [6]

[2] Denzinger-Bannwart-Umberg, *Enchiridion Symbolorum, Definitionum, et Declarationum de Rebus Fidei et Morum* (14.-15. ed., Friburgi Brisgoviae: Herder & Co., 1922), n. 1212.

[3] Sess. XIV, *de poenitentia*, c. 4, can. 5.

[4] Regan, " The Proximate Occasion of Sin according to St. Alphonsus," *The Australasian Catholic Record*, XXVI (1945), 97-109; Fabregas, " De Obligatione Vitandi Probabile Periculum Peccandi," *Periodica*, XXX (1941), 20-45; Naphole, " De Vera Proximae Occasionis Peccati Notione," *Periodica*, XXI (1932), 1*-34*, 129*-157*; Kelly, " Notes on Moral Theology," *Theological Studies*, XI (1950), 64, 65.

[5] Noldin, *Summa Theologiae Moralis* (21. ed., 3 vols., Oeniponte: Typis et Sumptis F. L. Rauch, 1931), I, nn. 325, 326; Genicot-Salsmans, *Institutiones Theologiae Moralis* (11. ed., 2 vols., Bruxellis: Dewit, 1927), II, 330; Merkelbach, *Summa Theologiae Moralis* (3. ed., 3 vols., Parisiis: Desclée, 1939), III, n. 667; Prümmer, *Manuale Theologiae Moralis* (8. ed., 3 vols., Friburgi Brisgoviae: Herder, 1936), III, n. 451; Aertnys-Damen, *Theologia Moralis* (14. ed., 2 vols., Taurini: Marietti, 1944), II, n. 476; Vermeersch, *Theologiae Moralis Principia, Responsa, Consilia* (2. ed., 4 vols., Romae: Università Gregoriana, 1926-1928), III, n. 542.

[6] *Legislation on the Sacraments in the New Code of Canon Law* (London, New York: Longmans, Green & Co., 1928), p. 30.

The same idea was expressed by the Holy Office in answer to the question whether an adult pagan who was near death could be baptized provided that he merely promised to retain but one of his many wives if he recovered. The Holy Office declared he would have to dismiss all but his one lawful spouse before he could be baptized.[7] The import of this response cannot be disregarded. The question concerned a dying pagan adult and his request for baptism, which is necessary for salvation. The only logical inference is that the Holy Office regarded such a circumstance as a voluntary proximate occasion of sin, which the person was called on to remove under pain of being refused the sacraments.

In the light of the foregoing, there exists a difficult problem when a catechumen refuses to separate from his unlawful wife. In such circumstances the only available solution, in fact the only practicable adjustment without compromise of principles, is the possible brother-sister arrangement. In a particular case this solution is possible only if the apparent proximate occasion of sin is actually a remote one, and if at the same time there is no danger of scandal.

The occasion of sin. The ultimate issue in the application of the brother-sister arrangement is a moral one, and hence a thorough study of the nature and types of occasions of sin is appropriate here. An occasion of sin is generally defined as some external circumstance—person, place, or thing—which attracts to and affords a facility for sin. The occasion is something external, and is not to be identified with the internal propensity resulting from human frailty, passions, evil habits and the like.[8] There are authors who define the occasion of sin as an external circumstance which induces the danger of sin—*periculum peccandi.*[9] Even though this definition is used by most of the authors who sponsor the strict view on the

[7] S. C. S. Off. (Quebec), 10 maii 1703.—*Fontes*, n. 765.

[8] Noldin, *op. cit.*, I, 325; Prümmer, *op. cit.*, III, n. 449.

[9] Aertnys-Damen, *op. cit.*, II, n. 468; Noldin, *op. cit.*, I, n. 325; Naphole, "art. cit.," *Periodica*, XXI (1932), 150*, 151*.

occasion of sin, nevertheless for the brother-sister arrangement this definition seems to offer a more convenient application. Using this definition in reference to an invalidly married couple, who through illness or advanced age have lived in continence for some time, one could conclude that for them there is no occasion of sin. In this case the internal inclinations would be absent. Thus Naphole, for example, insists that both the external and the internal elements are essential component parts of the occasion of sin, and there is no such occasion unless both are present.[10]

An occasion of sin may be continuous, as when parties in a bad marriage live together, or disjunctive, as when the occasion occurs only at intervals.

The occasion of sin may be either proximate or remote. A remote occasion is one which presents only a slight danger of sinning, or in which a person only rarely commits sin. Remote occasions exist universally, and they neither can nor need they be avoided. On the other hand, the definition of a proximate occasion of sin is a subject of controversy. The definition of St. Alphonsus (1696-1787), as followed by many theologians, offers the safest explanation. An occasion of sin, according to St. Alphonsus, is proximate when something external to a person—whether it be another person, or some place, or a thing—places him in grave danger or serious probability of sinning mortally, even though it is also probable that, despite the occasion, sin will be avoided.[11] Other theologians sponsor a more liberal view of the proximate occasion of sin by restricting it to one in which a person rarely, if ever, avoids mortal sin. Following the opinion of Lugo (1583-1660), they hold that a proximate occasion of sin is one in which the person sins always—*semper*—or at least most frequently—*omnino frequentius*.[12]

[10] *Ibid.*, p. 151*.

[11] Noldin, *op. cit.*, III, nn. 395-398; Regan, "art. cit.," *The Australasian Catholic Record*, XXVI (1945), 98.

[12] Cf. Genicot-Salsmans, *op. cit.*, II, n. 371.

Thus the school of St. Alphonsus holds that the proximate occasion of sin is present when the danger of sinning is truly probable, even though it is equally probable that, in spite of the occasion, sin will be avoided. The school of Lugo and Genicot (1856-1900) holds that the proximate occasion of sin is one in which a person always or almost always sins. As a result of this difference of opinion on the meaning of the proximate occasion of sin, the school of St. Alphonsus, following the axiom "*idem est in moralibus facere et exponere se periculo faciendi*" concludes that even the single occasion of sin must be avoided *sub gravi,* provided that the danger of committing mortal sin is truly probable. On the other hand, the school of Lugo and Genicot maintains that there is not a serious obligation of avoiding the single occasion of sin, unless the danger of sin is so great as to amount to a moral certainty —as would be the case when the occasion always or almost always results in serious sin.

This controversy holds paramount importance to the confessor in dealing with the single occasion of sin. However, since in this discussion there is question only of the continuous occasion of sin involved for a couple living in an invalid union, one can prescind entirely from it. The problem at hand, as touching the continuous ocasion of sin, does not admit of controversy, since all theologians agree that one has a serious obligation to avoid the habit of frequenting a voluntary occasion in which one often sins mortally.[13] As far as our subject is concerned, it must for practical purposes be taken for granted that, as long as the couple invalidly married are in a voluntary proximate occasion of sin, the only solution is that of a complete separation.

A proximate occasion of sin is voluntary if it can easily be avoided; otherwise it is a necessary occasion. The latter can be either physically or morally necessary. Physical necessity is exemplified in the case of a prisoner or a soldier who is not

[13] Noldin, *op. cit.*, I, n. 326; Genicot-Salsmans, *op. cit.*, II, 372; Kelly, "art. cit.," *Theological Studies,* XI (1950), 65.

free to remove himself from the occasion. The same is true of a lawful wife, if she be exposed to the danger of sin by living with her husband. A morally necessary proximate occasion of sin is one that can be avoided, but not without grave inconvenience or harm. An example generally agreed upon by the authors as a necessary proximate occasion of sin is that of a boy and girl keeping company with a view to marriage in the near future.

The following principles are deduced from the foregoing definitions:

I. The occasion of sin must be absolutely avoided, in each case, when it results in mortal sin. If the occasion constitutes a proximate danger to eternal salvation, we must heed the words of Christ concerning the plucking out of the eye and the cutting off of the hand (Matth., V, 29), and we must avoid the occasion even at the risk of life.[14]

II. It is neither possible nor necessary to avoid a remote occasion of sin. Such occasions exist everywhere for everyone in this world.

III. A voluntary proximate occasion of sin must be avoided under pain of denial of the sacraments. This is evident from the propositions condemned by Pope Innocent XI.[15]

IV. Physically necessary proximate occasions of sin cannot be avoided. They must, however, be made remote by means of vigilance and through the use of natural and supernatural helps.

V. It is lawful to expose oneself to a morally necessary proximate occasion of sin, provided that there is a firm and sincere willingness to use the means prescribed to make the materially proximate occasion formally remote.[16]

[14] Noldin, *op. cit.*, I, n. 326; Davis, *Moral and Pastoral Theology* (3. ed., 4 vols., London: Sheed and Ward, 1938), III, 291-293. Cf. also Noldin, *op. cit.*, III, n. 400.

[15] Denzinger-Bannwart-Umberg, *Enchiridion*, nn. 1212-1213.

[16] Noldin, *op. cit.*, III, n. 401; Prümmer, *op. cit.*, III, n. 450.

In spite of the fact that in mutual opposition there exist rigorous and liberal opinions on the nature of the proximate occasion of sin, nevertheless all theologians agree that there are occasions of sin which normally must be avoided, but which can lawfully be frequented, provided that the avoidance of them is morally or physically impossible. Even St. Alphonsus is to be numbered among these.[17] Such a view acknowledges the necessary proximate occasion of sin as a possibility. Ter Haar (1857-1939), who defended the view of St. Alphonsus, offered a most appropriate example.[18] He listed the case of a couple involved in an incurably invalid marriage.

> . . . omnino insistendum est *separationi physicae*, nisi cohabitatio et occasio proxima sit vere necessaria. Haec necessitas adesse potest, v.g.:
>
> a) si complices jam inierunt matrimonium civile quod rumpi nequeat;
> b) si jam nati sunt infantes quorum educationi provideri debeat;
> c) si cui ex separatione damnum valde grave vel gravis infamia oriatur,—haec tamen ratio non facile admittatur, utpote saepe ob passionem exaggerata;
> d) " si femina," inquit S. Alphonsus, " nequiret manuum labore se alere, aut in aliqua domo servire, aut mendicare sine dedecore aut aliquo gravi incommodo; " in hoc autem casu femina saepe in aliquo instituto locari potest.
>
> Si neque matrimonium, neque separatio physica fieri potest, *alia remedia* efficacia sunt praescribenda, quibus periculum peccandi e proximo reddatur remotum. Imprimis nitendum est, ut in separatis lectis vel etiam cubiculis dormiant, ut a signis specialis amoris omnino se abstineant, imo etiam ut solum cum sola esse, quantum possint, evitent.

It is evident that even the strict school of thought on this matter makes allowance for the possible application of the

[17] Noldin, *op. cit.*, III, n. 401; Regan, " art. cit.," *The Australasian Catholic Record,* XXVI (1945), 107.

[18] *Casus Conscientiae* (2. ed., Taurini: Marietti, 1939), n. 158.

brother-sister arrangement. The principles as illustrated in the foregoing example furnish the norms of judgment in a particular case, namely whether the proximate occasion is either voluntary or necessary.

Internal and External Forum

The granting of permission to parties to live together as brother and sister is not reserved exclusively to either the external or the internal forum. Public cases belong in the external forum, and the ordinary is the final authority in all cases, since these involve the welfare of the community and the danger of scandal. Canon 2356 outlines the procedure for the ordinary to follow in regard to bigamists. In the internal forum the confessor is competent to judge the disposition of his penitent, and it is within his field to make the decision whether, in a particular case, the materially proximate occasion of sin is formally remote, or, maybe, does not exist at all. It is of importance to note here that the competence of the confessor extends only to occult cases; if the knowledge of the bad marriage is a public fact, the matter must be taken up in the external forum with the ordinary as the final authority. Though in occult cases the confessor is undoubtedly competent, nevertheless it must be conceded that the granting of the brother-sister permission is a "*res plena periculis, ideoque fere numquam permittenda.*" [19]

False charity on the part of the confessor, or laxity through an appeal to the dictum "*sacramenta propter homines,*" is not a sufficient reason for granting the permission. It is true that the sacraments were instituted by Christ for the salvation of men, but the Church, the mouthpiece of Christ on earth, specifies that the reception of them is available only to those who are duly disposed, namely the ones who are truly contrite for all past sins and who cherish the firm purpose of not sinning in the future, which entails also the use of precautionary meas-

[19] Cappello, *Tractatus Canonico-Moralis de Sacramentis,* III, *De Matrimonio* (4. ed., Taurinorum Augustae: Marietti, 1939), n. 841, 3°.

ures to avoid the occasions of sin.[20] The confessor should be aware of the warning of St. Charles Borromeo (1538-1584), which has often been repeated by the Holy See: "*Ex magna absolvendi facilitate, magnam peccandi facilitatem oriri necessario debere.*" [21] In particular the pre-eminence of the spiritual good of the community must always be kept in mind. Since the private good of the penitent must yield to the common good, the confessor must avoid the occasioning of scandal and must safeguard the good of the community, even in extreme cases when the refusal of absolution would expose the penitent to the possibility of grave infamy.[22]

Moreover, in dealing with penitents who have repeatedly succumbed to the same proximate occasion of sin, the confessor cannot always extend the dictum: "*Poenitenti credendum est, sive pro se sive contra se loquenti.*" [23] The penitent can easily err in estimating the sufficiency of his own disposition. The final judge in the matter of the requisite dispositions of the penitent is the confessor, after careful questioning regarding the past circumstances.[24] Experience will show that many penitents in their ardent anxiety to be re-admitted to the reception of the sacraments make promises very freely, but after absolution forget these promises most readily, or do very little towards keeping them.[25]

In occult cases *in foro interno* the competence of the confessor cannot be questioned, but he is hardly in a position to ascertain all that needs to be known. Sometimes the penitent may in good faith believe that the invalidity of his marriage

[20] Conc. Trident., sess. XIV, *de poenitentia*, c. 4, can. 5.

[21] S. C. de Prop. Fide, instr. (ad Vic. Ap. Cochinchin.), mense aug. 1827.—*Fontes*, n. 4740; Benedictus XIV, ep. encycl. *Apostolica Constitutio*, 26 iun. 1749, n. 22.—*Fontes*, n. 400.

[22] Ter Haar, *De Occasionariis et Recidivis* (2. ed., Taurini-Romae: Marietti, 1939), p. 81.

[23] Noldin, *op. cit.*, III, n. 401; Genicot-Salsmans, *op. cit.*, II, n. 371.

[24] Noldin, *loc. cit.*; Genicot-Salsmans, *loc. cit.*

[25] Ter Haar, *Casus Conscientiae*, n. 59.

is not publicly known, whereas in reality it may be a subject of current gossip, which is discreetly kept from his ears. The penitent may have been responsible for the break-up of the former marriage, and the granting to him of the permission here in question would be regarded as placing a premium on his misdeeds. Again, the confessor may indeed be sure of the dispositions of the penitent, but he has no way of ascertaining the willingness of the other party to forego without a struggle all physical relations. In view of these difficulties the confessor should be guided by the advice of eminent canonists and moralists that the granting of permission to parties to live together as brother and sister is a very dangerous thing, and *should practically never be undertaken by him.*

The ordinary is responsible for the promotion of the spiritual welfare of the community, and hence the matter of regulating the avoidance of scandal falls under his jurisdiction. He is in the dominant position to employ a variety of means to determine the danger of scandal in any particular case, and to judge the dispositions on the side of both parties.

External forum procedure. Since there is no set formula, either in Canon Law or in Moral Theology, for the granting of the brother-sister arrangement in bad marriages, every attempted formulation of rules of practical procedure must be based on the following set of principles:

I. There can be no permission or even toleration of an occasion of sin which exposes a person to the proximate danger of losing his immortal soul.

II. The brother-sister arrangement is not an alternative; it simply offers a solution in the nature of a last resort.

III. This solution cannot be allowed unless it is evident that the proximate occasion of sin is necessary and that there is reasonable hope that it can be made to be formally remote.

IV. Any danger of serious scandal eliminates the possible use of the brother-sister arrangement. This is of paramount importance, because scandal in such matters

would readily encourage others to be reckless in marriage; it would put the stamp of authoritative approval on the popular fallacy that marriage is a private matter and, as such, has no bearing on religion and salvation, and, finally, it would give the impression that the Church is compromising in regard to the doctrine of Christ concerning marriage.

The foregoing principles can be used in the investigation of petitions from parties for the permission to live together as brother and sister. The verification of all the four guiding principles in each particular case will help the parish priest to whom the petitioners come, and also the ordinary, whose burden it becomes to render the final decision. In pursuance of the plan proposed by Monsignor Król, it seems an admirable approach to put these principles in the form of questions.

I. *Is there any other possible remedy?*

In elaborating the answer to this question, enquiry is made as to whether the marriage in question could be convalidated through the renewal of consent or by way of a sanation. If there is a possibility that the previous marriage was invalid, or at least that there are serious doubts about its dissolution through the alleged death of a previous spouse, then the case should be referred to the diocesan matrimonial tribunal. The same is true of the case wherein there is a reasonable hope of convalidation by means of a Pauline Privilege. The tribunal would then relay any pertinent information about the parties to the ordinary if a petition for a brother-sister arrangement was inevitable. It may be that neither of the parties was previously married, but that because of serious illness there is reason to question the capacity of a person to contract a valid marriage. In such cases a brother-sister arrangement may eventuate as the only reasonable solution.

II. *Is separation impossible?*

The affirmative answer to this question must prove that the proximate occasion of sin is a necessary one. The reasons for

the non-separation of the two parties must be of a compelling character. Authors indicate the following reasons: the welfare of young children which cannot otherwise be secured; poverty or financial inability to maintain separate living quarters; the danger of publicizing the hitherto unknown invalidity of a marriage; the reasonable hope of a convalidation by way of a favorable decision in a matrimonial cause; an incurable and lingering disease of either of the parties, etc.

III. *Is there danger of scandal?*

Here the problem reaches the zenith of difficulty. It can be assumed that every brother-sister case offers a potential source of scandal. Convincing proof and assurance of the absence of scandal must be had before the granting of permission may be effected. An invalid marriage is generally a matter of public record, yet it may not be a matter of public knowledge. With the mention of the word "public" there can arise a controversy on whether the term should be gaged according to the norm of canon 1037, or that of canon 2197. It seems that the norm of canon 2197 should be used, since scandal arises not from records in archives, but from the knowledge of the people. If, then, the fact of an invalid marriage is not known, and if there is no danger that the fact will become known, the granting of permission for the brother-sister arrangement should be given consideration. Sometimes people know that a marriage is invalid, but think it to be such for lack of compliance with the requisite canonical form. In this case the reception of the sacraments would in the popular estimation be regarded as pointing to the convalidation of the earlier invalid union. In particular instances, however, parties involved in an incurably null or invalid marriage may move to a distant town or to some other part of the country, where the danger or even the possibility of scandal may not exist. A similar instance could occur when parties move completely away from their own neighborhood to the suburbs or to some distant section of a very large city or metropolitan area.

The lamentably large divorce rate of today has made the crime of divorce a commonplace. In small towns or in villages the obtaining of a divorce may be sensational news, but in the large towns and cities it is disregarded by most people, and only very few divorces of the so called distinguished rate any publicity in the newspapers, so that the possibility of scandal is very much diminished. Furthermore, most people involved in marital troubles make every effort to conceal their divorce and remarriage, and in many cases cover all traces successfully by divers means.

In order to determine carefully the element of probably ensuing scandal one needs to consult not only the proper pastor but also the pastor of every parish where the couple resided during the time of separation, divorce and remarriage. In most of the cases there may be but a slight danger of scandal, which danger can sometimes be very effectively forestalled if the parties are directed to receive the sacraments in only such churches where their marital status is not known.

IV. *Is there danger of incontinence?*

The danger of incontinence cannot be accurately determined by any standard rule, since it is almost entirely a relative thing. Generally, when parties apply for the brother-sister permission, they are determined to avoid this danger if they are sincere. In some cases they have by experience become satisfied that they can live together as brother and sister. Regarding this matter of incontinence the following elements should be carefully considered: the age of the parties, the condition of their health, their extraordinary virtue and sincerity, their past experiences in making a materially proximate occasion of sin a formally remote one. A dignity and a propriety that is in keeping with the sacred ministry should be maintained by the priest in his seeking of information on this delicate subject, since much of this knowledge is strictly matter for confession, and accordingly would not be sought or demanded outside of the sacred tribunal of penance. A simple

question, such as, " what reasons have you for believing that you can keep the promise to live in a brother-sister relationship? " usually will bring answers that will determine whether or not their conviction is based on past experience in their marriage relations. If the answers are not spontaneous and convincing, it may be advisable to direct the parties, before they seek for the permission to live together as brother and sister, to supply some convincing proofs to assure themselves that they can keep the called for promise.

The primary purpose of this discussion is to suggest a practical procedure in dealing with brother-sister cases. Monsignor Król, who pioneered in this field, developed a practical method for procedure. The method will require the co-operation of the parish priest, and, in some cases, of the diocesan tribunal. Petitions are submitted to the ordinary, who acts as the sole judge and authority in all such cases.[26] It seems to this writer that in purely occult cases, when there is no question of the danger of scandal or of incontinence, the confessor could be the final judge, apart from all reference to the ordinary. Such a procedure in the external forum regarding a matter which belongs to the sacramental forum involves danger to the seal as well as possible infamy for the parties, and for that reason should not be brought into the external forum. As regards cases introduced *in foro interno non-sacramentali,* there is nothing in the law to deprive the confessor of competence, and accordingly he can grant the permission, provided always that in his handling of an occult case he is morally sure that no danger of scandal and also no founded suspicion of likely incontinence exists.

In the external forum, when the parties come to the parish priest, application should be made to the chancery for a form which eventually may implement the brother-sister arrangement, which form consists of a combined questionnaire and

[26] Król, " Permission to Parties Invalidly Married to Live as Brother and Sister," *The Jurist* (Washington, D. C.: The Catholic University of America, 1941 —), XI (1951), 26.

petition, contains furthermore a set of instructions for the priest, and incorporates a formulary of the promises which are to be signed by the petitioners. This form could likewise list the following directive to the priest:

N.B. This petition may be used ONLY if

1) convalidation of the union is IMPOSSIBLE;
2) separation is extremely difficult to accomplish;
3) all danger or threat of scandal is absent, and
4) the danger of incontinence is precluded in view of the advanced age or in consequence of some grave illness of the parties.

When the priest applies for this form he should write a letter that not only contains his own considered comments on these points but likewise presents all the arguments which stand in favor of or in opposition to the judicious granting of the sought for permission.

The parties are to be interviewed individually and separately. The same questions are submitted to each of the two parties. The questions are to be so formulated as to evoke from the parties the needed information about the previous marriage and the present invalid union, about the duration of their residence in the locality, about the reasons for their not separating, about the nature of their illness, about the number of persons, Catholic or non-Catholic alike, who know about the invalidity of their union, about the number of people who know that the union cannot be convalidated, about the reason in consequence of which they possess this knowledge, about the cause of the earlier divorce, and, finally, about the character of the previous spouse. The answers, when given to all the questions raised in connection with the petition, generally afford complete information on the danger of scandal and incontinence as also on the reasons for not separating. Once this form is filled out, it will help the priest to know whether there is reasonable hope for a favorable decision, the while it furnishes him an easy approach and a reassurance for his

conscience in regard to his obligation of seeking the return of the stray sheep to the fold.

Partial or Temporary Petitions

When parties seek the use of the Pauline Privilege while they are living in an invalid union, then there is need of additional precautions. Most generally these parties are neither advanced in age nor are they afflicted with any grave illness. In many cases the hope of convalidation remains groundless. The fact of their attempted marriage provides a strong argument against their ability to moderate and control their passions, for because of them the parties seemed willing to risk their salvation by entering a bad marriage. For added assurance the priest will place the case before the matrimonial tribunal, which will determine the sincerity of the parties and the reasonableness of their hopes for a favorable decision.

In all potential convalidation cases the priest will inquire first of all into the possibility of the use of the Pauline Privilege. If there be a well-founded hope for its use, the priest will encourage the non-Catholic party to begin instructions in the Faith, and will demand that the Catholic party attend the same instructions. In the course of these instructions the priest should emphasize the necessity of the avoiding of all sin and of the forestalling of everything that looms as a likely danger of sin. When the instructions are near completion and the priest is convinced of the parties' sincerity and of their willingness to obey the laws of God coupled with the desire of the non-Catholic to embrace the Faith, then the case is sent to the diocesan tribunal. The tribunal, if it passes a favorable judgment on the sincerity of the parties' dispositions, will recommend a petition for the permission that they live together as brother and sister.

The permission in these cases is granted only on a temporary basis, i.e., until the final decision is given in the matter. With reference to these cases, an excellent guide for tribunals is contained in the instructions given by Archbishop Hoban

of the Diocese of Cleveland. This is primarily concerned with mixed marriages which can possibly be convalidated by means of a Pauline Privilege. In all these cases the problem of baptizing a person living in a proximate occasion of sin arises.

The instructions are the following:

I. All such cases will, in the first instance, be referred directly to the tribunal, which will invariably direct the parties to effect a complete separation.

II. If the parties claim that a complete separation is impossible, the tribunal will insist on a partial separation—*quoad torum*—and will investigate whether the reasons for not separating truly exist and are compelling.

III. The tribunal will submit and recommend a brother-sister petition only when it is ascertained that:

a) the reasons for not completely separating exist and are compelling:
b) the danger of scandal is absent or at least certainly remote;
c) the hope for a favorable decision is solidly probable;
d) the extraordinary sincerity and virtue of the parties augurs well for their observance of total continence, and
e) the experience of the couple from the time of their first visit to the tribunal confirms their willingness and ability to live together as brother and sister.

IV. As a general rule, petitions are not to be submitted for a couple if the parties in bad faith, after contacting the tribunal, attempted an invalid marriage.

V. Since the danger is immeasurably greater when both parties of an invalid marriage are Catholics of long standing, the possibility of granting brother-sister permissions to such people will be most rare.

VI. Permission to live together as brother and sister, in favor of a couple whose matrimonial cause is pending at the tribunal, will be limited to the final conclusion of their cause.

When, therefore, a cause is abandoned or given an unfavorable decision, the tribunal will inform the parties that the brother-sister permission has expired, and will notify the chancery that the cause has been concluded.

When all requisite information has been obtained, each party, in the presence of the other before the priest, makes the following promises under oath:

Realizing fully the sacredness of an oath, and my obligation before God, and touching the Holy Gospels, I solemnly swear:

1. that under no circumstances will I ever attempt to live as husband (as wife) with my present consort;
2. that, if I violate this promise, I will not attempt to receive the sacraments until I have separated, or referred the matter to the bishop;
3. that I will receive the sacrament of Holy Communion only in churches where my marital status is not known to the parishioners;
4. that I will explain my status to my confessor, and will report to him at least four times a year on the observance of my promise, and
5. that I will take all precaution to preclude scandal from the use of the privilege for which I submit this petition.

So help me God, and these His Holy Gospels.

The petition is then forwarded to the ordinary, together with a letter from the parish priest, and, in tribunal causes, a letter from the *Officialis*. If further information is required, the petitioners are summoned to the chancery through the parish priest. If it prove necessary, the pastors of the parishes in which the parties lived at the time of the divorce and remarriage are contacted. When the information is complete and the arguments in favor of granting the permission are conclusive, the ordinary grants the request by signing his name to the petition. The petition together with all related

correspondence and documents is filed in the chancery archives.

A notice of the grant is mailed to the parish priest, together with a copy of the promises. The priest informs the couple, and relays any particular instructions that may be given.

The foregoing method of procedure has proved successful in the Diocese of Cleveland, and can serve in those dioceses which hitherto have had no set method of approach. While it may be said that the demands made for the application of the brother-sister arrangement will limit its availability to very few bad marriages, it is nevertheless true, as is known from experienced priests, that many couples could avail themselves of the privilege if they knew that there are possibilities for its acquisition. Many, too, could have enjoyed the reception of the sacraments long before the occasion when a parish priest or a hospital chaplain informed them regarding this privilege.

The need for a curative program cannot be gainsaid. Accordingly it is hoped that the knowledge of this procedure become widespread among parish priests and receive the cooperation of the local tribunals, as an available instrument in the program of the salvation of souls. Deserving couples living in bad marriages should be informed of the existence of the brother-sister arrangement as a practicable means under carefully drawn limitations and within judiciously applied qualifications. Thus a contribution can be made towards the campaign against the devastating pagan influences regarding marriage, and a helping hand can be extended in rescue of the unfortunates who have become matrimonial casualties. The brother-sister arrangement may perhaps remain the one means for a given couple to gain the restoration of grace and to achieve the attainment of their ultimate end as favored creatures of God.

JAMES P. GODLEY

PINE BLUFFS, WYOMING

THE LAW OF MARRIAGE IN POLAND

THE last World War, which changed the political, social and economic life of the world, had far reaching effects upon the life in Poland.[1] The first victim of war, Poland, in spite of the heroism of its citizens, suffered defeat. Its many cities, rich in historical monuments, were destroyed. The price of occupation and liberation was the blood of thousand upon thousands of its sons. New borders divided its old territory. Vibrant government changed the traditional political and social life. It is natural that such events resulted in a change of legislation. The law governing marriage was, in the opinion of the recent Polish jurists, in need of primary consideration.

Up until the Second World War, the law governing marriage was not uniform. The territory, formerly occupied by Russia, was governed by the Russian rule; the territory of the Austrian occupation, by the Austrian rule; and the territory of the Prussian occupation, by the German rule.[2]

The new Polish law, published on September 25, 1945, and the new *Family Code,* promulgated on August 2, 1950, unified the laws concerning marriage in Poland and at the same time introduced two very discriminating changes: Civil Marriage, and Divorce. In reality the law of marriage published on September 25, 1945 was in force up to August 2, 1950. From this date until the present time marriage is governed by the prescriptions of the above mentioned *Family Code.* However, in order to appreciate the full meaning of this new *Family*

[1] Although this article concerns itself primarily with the Polish law of marriage, it nevertheless characterizes the juridical system in all countries behind the Iron Curtain. Communist legislation remains essentially unchanged, and, depending upon the local conditions of a particular territory or country, changes only its form.

[2] Cfr., Stefan Bancerz, *Nowe Prawo Małżeńskie* (The New Law of Marriage), Warsaw, 1945, pp. 13-14.

Code it is absolutely necessary to become familiar at first with the law of 1945, because it was the fundamental source of the present legislation concerning civil marriage and divorce.

I. CIVIL MARRIAGE

Prior to the promulgation of the law of September 25, 1945, with the exception of the territory governed by German law, marriage in Poland was a question of religious denomination. To be valid, it was necessary to contract marriage before a priest or minister of one's respective convictions. In all the Christian churches, both Catholic and Protestant, documents of birth, marriage and death were recorded, maintained and disposed of by the pastors, who were recognized by the State as civil magistrates. Since September 25, 1945, marriage in Poland must be contracted before a civil magistrate in the presence of two witnesses. The parties, if they so desired, might have recourse to their pastors for a religious ceremony either before or after a civil marriage.[3] But as far as the State was concerned the religious ceremony had no juridical value.

Particular Rules

a) *Betrothal.* Although the new Polish law considered betrothal as a simple custom without a juridical character, it nevertheless sanctioned its importance and discussed many problems regarding this matter. The first concerned itself with the question of the breaking of a betrothal. Should one of the parties break such a marriage engagement, had the second party the right to demand the fulfillment of the marriage promise? Of course not. No one could enforce an engagement to the extent of compelling the culpable party to contract the marriage that he promised; the marriage contract must be expressed by an act of the free will. However, if the

[3] A new Polish decree published a few months later ruled the possibility of a religious ceremony only after the contract of a civil marriage.

innocent party had suffered any financial loss, this party could prosecute the guilty person in a civil court.[4]

b) *Age.* According to the new Polish law, marriage could not be validly contracted by a boy or girl until the eighteenth year of age had been completed. The experiences of the last war prepared the young people to confront the difficulties of life—to understand the importance of marriage and all of its problems. These were the motivating reasons for changing the prescription regarding age. It can be readily seen that a strict adherence to such an age limit could, at times, be most detrimental. For this reason article 6, par. 2, made exceptions, and permitted marriages before the completion of the eighteenth year of age, e.g., antecedent maturity or pregnancy.[5]

c) *Marriage Impediments.* The new Polish law eliminated the necessity of parental consent for marriage, and the publication of the banns, as "formalities . . . without any sense, particularly in the larger cities . . .".[6] Article 7 established the following impediments to the marriage of:

1. Persons who are held to the bond of an already existing marriage.[7]
2. Relatives in the direct line.
3. Persons related by affinity in the direct line.

[4] Cfr., Stefan Bancerz, *op. cit.*, pp. 13-14.

[5] Cfr., Stefan Bancerz, *op. cit.*, pp. 14-15.

[6] Cfr., Stefan Bancerz, *op. cit.*, p. 16. On the contrary, while an assistant Pastor of a large parish in Paris, I was convinced of the necessity of publishing banns.

[7] This was a very characteristic rule concerning a case of absence. In accordance with art. 8, par. 2, the first marriage was dissolved when the second marriage was contracted. Example: Two parties contracted marriage in Poland before the war. During the war they were separated by force of necessity. The husband, a former Polish soldier, is at present living in the United States. Due to political reasons he cannot return to his wife in Poland. If the wife wished to contract a second marriage, she would be permitted to do so, because her second marriage would automatically annul the first contract. This is an example of how the Communistic Government, employing political reasons, attempt to change and destroy the principles of Divine and Natural Law.

4. Persons who are in legal relationship, namely adoption.
5. Persons, who, during the existing marriage, employed threats or any other means on the life or well-being of their spouse or the spouse of another.
6. Persons having mental or physical sicknesses, as tuberculosis, venereal disease.

d) *Form of Marriage.* Under the present regime, the religious convictions of individuals had no juridical value for the State. For this reason the new Polish law stated the following norm regarding the form of marriage. " Only those marriages are valid which are contracted before a civil official in the presence of two witnesses (art. 2). If the parties wish to satisfy their religious beliefs, they may appear before their pastors for the religious ceremony before or after the civil marriage, but this ceremony has no juridical value before the State " (art. 12, par. 2).

e) *Annulment of Marriage.* According to article 9, a marriage was invalid if:

1. It was contracted in the state of unconsciousness or psychic illness, even though only one party was thus affected.
2. Marriage was contracted in error concerning the identity of the spouse.
3. The marriage was contracted under the influence of fear caused by the spouse or a third person.

According to article 17 par. 1, either party could petition the annulment of a marriage if it was contracted with some impediment as indicated in the 7th article.

The possibility of an annulment of a marriage expired:

1. In the case of non-age: when the spouse attained the necessary age for contracting the marriage.
2. In the case of bigamy: after the first marriage was legally dissolved.
3. In the case of sickness: when and if it was cured.

4. In the case of error or fear: if three years had elapsed since the marriage contract.

II. DIVORCE

Prior to January 1, 1946, Poland, as mentioned above, had a juridical system which was not uniform. Its territory was governed by the law of former occupants: Russia, Austria and Prussia. As a result, divorce was also regulated by the laws of these mentioned countries.

A. The Territory under Russian Occupation

1. *Catholic Denomination.* According to article 186 of the law published on June 24, 1836, the validity or invalidity of a marriage was regulated by the prescriptions of the sect to which the parties belonged. Inasmuch as in the Catholic Church a valid marriage is canonically indissoluble, it is clear why in this territory divorce for Catholics was not admissible.

2. *Protestant Denomination.* The question of marriage concerning Protestants was regulated by articles 145 and 146 of the same law proclaimed in 1836. Article 145 admitted dissolution of a marriage either because of the death of one of the parties, or divorce. It is readily understood why divorce was permitted for the above mentioned persons.

3. *Orthodox Denomination.* Marriages of persons of the Orthodox church were regulated by the Russian Civil Code. A competent tribunal of the Orthodox church regulated the dissolution of the marriage bond. This tribunal admitted such causes as impotency, adultery, etc., as grounds for obtaining a divorce.

4. *Jewish Denomination.* According to article 189 of the above mentioned law, divorce for Jews was permitted and practically regulated by the Mosaic law and the Talmud.

B. The Territory under Austrian Occupation

1. For all Polish citizens of the Catholic denomination divorce was excluded according to article 103 of the Austrian

Civil Code. It admitted, for certain reasons, separation of the spouses.

2. Marriages of all other existing Christian sects were regulated by the respective cult of the contracting parties.

3. Divorce for Jews was not excluded according to articles 133-135 of the Austrian Civil Code.

C. The Territory under Prussian Occupation

According to article 164 of the German Civil Code, divorce was permitted for reasons of adultery, impotency, etc.

This is a brief historical conspectus of the law of divorce in former Poland.

From January 1, 1946 to August 2, 1950, according to article 24 of the new Polish law regarding marriage, divorce was admitted for all Polish citizens regardless of religious denomination. In particular, divorce was permitted if one of the spouses: 1. committed adultery; 2. threatened the life of the other spouse or children; 3. refused maintenance for the family; 4. deserted the family for one year or more; 5. committed any shameful crime; 6. lived a licentious or immoral life; 7. took part in or benefited from any shameful profession; 8. drank habitually or used narcotics; 9. had venereal disease; 10. was mentally afflicted; 11. was impotent, regardless whether antecedently or subsequently.

The Effects of Divorce

a) *On the Spouses.* The spouses were completely free after a legal declaration of divorce. Since they were no longer husband and wife, they had no rights or duties between themselves; they were independent persons and free to contract another marriage.[8] If the grounds for granting a divorce were either the concealment of an impediment or a previous shameful life of one of the parties, the guilty spouse was held responsible for everything and must make material and moral compensation to the innocent party.[9]

[8] Art. 28.

[9] Art. 29-39.

b) *On the Children.* It is natural that children conceived during a marriage and born after its dissolution cannot be considered as illegitimate. So too, according to the new Polish law, such children were legitimate. The same principle was used in the event of a divorce. The children conceived during a marriage and born after a divorce also had a legal status. Who was responsible for the education of such children? Usually the innocent party. The guilty party as a rule was always deprived of this privilege, but must assume a part of the financial responsibility together with the innocent party.[10]

This then was the law of marriage in Poland as published in 1945.

III. THE FAMILY CODE

In order to be "more modern and democratic," the Polish jurists drew up a new *Family Code* in 1950, which necessarily contains many legislative enactments concerning the question of marriage.[11] Although this Code does not formally consider the previous norms of the law published in 1945, as we have previously mentioned, it does, however, deal with practically the same essential rules governing marriage.

A. Contracting of Marriage

"Marriage is contracted", states article 1, "if a man and a woman make a declaration of marriage before a civil official."[12] For such a declaration it is necessary to produce a certificate of birth and to verify the absence of any impediment. If a person cannot produce a certificate of birth or prove his freedom to marry, a statement of two witnesses suffices. Since a marriage can take place by proxy, the actual presence of the parties is not always necessary.

According to recent legislation the following are impedi-

[10] Art. 31.

[11] "Dziennik Ustaw R.P." no. 34, poz. 308-309, Warsaw, Aug. 2, 1950.

[12] Cfr., art. 2, *The Law of Marriage*, 1945.

ments of marriage: [13] existing bond (art. 7); relationship in the direct line (art. 8, par. 1); affinity in the direct line (art. 8, par. 2); and mental or psychic illness (art. 9). The impediment of mental or psychic illness can bring about much abuse. "It is forbidden," says this article, "to contract marriage with a person suffering a mental or psychic illness." Nevertheless, the civil tribunal can issue to the mentally deficient a permit to contract marriage providing that their mental illness does not impair the fulfillment of the purpose of marriage.

Finally, in regard to age, a marriage contract is not forbidden to a boy or girl after the completion of the sixteenth year of age should their lawful superiors give their consent.

B. Matrimonial Community

According to article 14, the husband and wife have the same rights and duties. They must work for the benefit of the family, and they must live together if their financial ability permits. If not, they can live separately and visit one another for their common good.

The husband and his wife are responsible for the welfare of their children. But if they cannot agree about their child's future, such as education, general care, etc., then the civil tribunal makes the final decision.

C. Divorce by Agreement

The *Family Code* follows the principle of free will. Just as the contract of marriage, it says, is an act of the free will, so too divorce can be mutually agreed upon. "If the parties are incapable of achieving the end of marriage," states article 29, "they may request its dissolution by obtaining a divorce." [14] Naturally, a divorce will not be granted should the guilty party alone make the request (art. 30); but if the innocent party agrees, the divorce is granted. Moreover, even

[13] Cfr., art. 7, *The Law of Marriage*, 1945.

[14] Cfr., art. 4, *The Law of Marriage*, 1945.

without the agreement of the parties, a divorce is possible for so called "social reasons" (art. 30, par. 2).

A divorce cannot be obtained without a decision regarding the welfare of the children (art. 32). In general, the innocent party is responsible for their education, but, in the event of material difficulties, the guilty party is obliged to contribute toward the support and maintenance of the children involved.[15]

The foregoing is but a brief outline of the Polish law (1945) and the Polish *Family Code* (1950) concerning marriage and divorce. It is evident that a unification of marriage laws in Poland was urgent and necessary. It was inconvenient to have three distinct territorial marriage laws in the same country. From the concept that the State is a uniform political institution results the postulate of one law equal for all citizens. The existence of different juridical systems within the territory of the same State weakens its organization and political unity. Nevertheless, the Polish people, influenced by Catholic tradition throughout the many centuries, did not accept and will never accept the law of marriage and divorce as something beneficial of the twentieth century.

"Religious convictions," say the modern Polish jurists, "are something personal. Each Polish citizen can individually recognize the authority of the precepts of the Church, but these precepts cannot bind all citizens . . . . Marriage is not a personal, but a social institution, and is therefore dependent on the State without any interference from the Church . . . ." "It is strange," they continue, "that Canon Law proclaims the indissolubility of marriage and at the same time encourages the destruction of its permanence. Although Canon Law does not admit divorce, yet how easily it does permit the separation of the spouses, thereby destroying marriage . . . . Each of the spouses lives independently, seeking the

[15] The *Family Code* makes no distinction between legitimate and illegitimate children. The children born out of wedlock have the same privileges as children born in marriage.

company of others . . . . The children are educated inadequately . . . , they cannot adapt themselves to be conscientious citizens of the State . . . . For the State it is of paramount importance that marriages produce good citizens . . . . If marriage is incapable of achieving this end and cannot produce the intended effects . . . , it is necessary to dissolve such a bond . . . . We are living in times when the majority of civilized countries are benfiting from civil marriage and divorce . . . . It is necessary to end once and for all the antiquated beliefs of the past which have no part in a modern and democratic world." [16]

These are the arguments of the contemporary Polish jurists. As to my personal contention, to give a rebuttal to the above mentioned statements would be a waste of time and energy. It is of greater benefit to the individual as well as to the State to be mindful of the general rules of the Church regarding civil marriage and its logical consequence, divorce.

Canon Law does tolerate the celebration of marriage before a civil official only in extraordinary cases, i.e. when the canonical form cannot be observed.[17] On the other hand, the State can oblige the unbaptized to observe the civil form of marriage. Nevertheless, the same State has absolutely no right to force those baptized to the civil form of marriage as the only valid form. The State cannot consider the marriage of the baptized *quasi contractum mere civilem et profanum*,[18] because *". . . inter baptizatos nequit matrimonialis contractus validus consistere quin sit eo ipso Sacramentum."* [19] Since the marriage of the baptized was elevated by Jesus Christ to the dignity of a Sacrament, the same marriage is subordinated only to the authority of the Church. Naturally, as a social institution marriage must be regulated by the State. The

[16] Cfr., Stefan Bancerz, *op. cit.*, pp. 8-12.

[17] M. a Coronata, *De Matrimonio*, Taurini-Romae, 1946, p. 979.

[18] cc. 1098-1099.

[19] c. 1012.

State for its own purposes has the right to impose certain civil formalities on the contracting parties, but these formalities are not a part of the essence of the marriage contract.

What about divorce? From the fact that the Polish law imposes the civil form of marriage, it also permits divorce, because divorce is the ordinary consequence of a civil marriage. It is no wonder that the new Polish law permits divorce after a civil marriage. It infringes upon the Supernatural when it assumes the right and permits divorce after a marriage has been contracted in the Church. If the Polish legislators were influenced by Catholic philosophy, they would recognize the following principles:

1) Matrimonium esse indissolubile, ipsa lex naturalis et positiva divina in paradiso terrestri promulgata statuit.
2) Christus matrimonio absolutam indissolubilitatem restituit quam habet ex ipso iure naturali et cui particulariter derogatum fuerat in Veteri Testamento ob duritiam cordis Hebraeorum.
3) Cum matrimonium verum iure naturali et positivo divino indissolubile sit, fieri non potest, ut divortium auctoritate aliqua humana sive civili sive ecclesiastica concedi queat.[20]

To understand these principles it is necessary to show some good will and eliminate political ideas from such a holy institution like marriage. All who follow the rules of Soviet Russia cannot recognize the Supreme Being, God, and the authority of His Church in matters of such momentous importance as is the institution of marriage.

Rev. J. Piekoszewski

[20] M. a Coronata, *op. cit.*, p. 981.

ANALYTIC COMPARISON OF TRIALS UNDER CANON LAW AND CIVIL LAW WITH SPECIFIC REFERENCE TO THE EXAMINATION OF WITNESSES *

The Examination of Witnesses in Canon and Civil Law

Part I.**

THE principal aim of this paper is to present in a general way a comparison of trials conducted under the procedural rules of Canon Law and Civil Law with specific reference to the one question of the *Examination of Witnesses.* The prime interest in this presentation will be the supplying of general knowledge but there remains the possibility that in some instances, where the Canon Law is not too definite or specific on a particular matter, the Civil Law prescripts may be of assistance and the borrowing of these might aid in the more effective application of the Canon Law to the end that truth and justice may be more equitably administered.

The scope of this paper will include the examination of witnesses exclusively, with no reference being made to the examination of the parties, unless such is necessary to explain the points of law pertinent to the proper subject. Neither will specific mention be made of special types of witnesses, e.g., character witnesses, expert witnesses, etc., and this in the interest of brevity. For the most part, the subject matter will be restricted to direct examination with only passing attention being paid to cross-examination, where it is thought that this

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** Part II of this subject will appear in the October issue of *The Jurist* for the current year.

will be helpful. Finally, no reference will be made to witnesses in criminal trials as the main interest of the assembled group, from a practical point of view, is contentious trials.

More positively, the material of this paper will include such topics as the right of the advocate to be present at the examination of his client's witnesses, the right to summon witnesses, qualifications required in a witness, actual interrogation of witnesses with special reference to the quality of the questions and answers and various conclusions relative to the admissibility of hearsay evidence.

An important matter to consider, at first, is the right of a party's advocate to be present during the various proceedings of the trial, especially during the legal examination. Neither the Code nor the Instruction "*Provida Mater*" makes any mention of the right of a party's advocate to be present at and assist in his examination. Since there is no positive exclusion on this point, and since the presence of the advocate will be most helpful to his client's cause, it is thought that he should be admitted at least to this particular session.

Again, the Code does not explicitly prohibit the presence of a party and his advocate at the interrogation of the adverse party but some writers maintain that ordinarily they should not be admitted.[1]

As to the parties and their advocates being present at the examination of witnesses, the Code declares that the parties could not assist unless the judge thought that they should be admitted.[2] Under this provision, no mention was made of the advocates. Thus, his right to be present was a moot question until the Instruction of the Sacred Congregation of the Sacraments in 1936 stated that "ordinarily, neither the parties nor their attorneys nor advocates may assist at the examination of the witnesses. However, the permission may be given by way of exception by the *Instructor* to admit the parties or

[1] Wernz-Vidal, *Ius Canonicum*, VI, pars I, 372; Coronata, *Institutiones Iuris Canonici*, III, 1269.

[2] Canon 1771.

their attorneys or advocates, if the circumstances of the case seem to suggest this according to the prudent discretion of the *Instructor.*" [3]

Apparently the reason for the general exclusion of the parties is the fear that they might unduly influence the witness by their presence and thus induce him to perjury.[4] With the exclusion of the parties, the judge has greater freedom in questioning the witnesses and they, in turn, have more incentive to tell the truth.[5]

The present writer agrees that these consequences are possible, if the parties are present at the examination of the various witnesses but suggests that little, if any, harm can come to anyone by admitting the party's advocate to these proceedings. In addition a helpful contribution can be made by him to the integrity and completeness of the trial.

It is evident in Civil Law that in every case there is a true contest with both parties present in court and usually represented by counsel, who are ready to present all evidence, which favors their client, question all the evidence, which is not admissible under the law and enter all appropriate objections. With both sides eager to obtain a favorable verdict, all favorable evidence will be submitted and proper advantage will be taken of every legal right. This insures, in so far as it is humanly possible, the obtaining of maximum truth and the rendering of a more just and equitable decision.

In contentious cases conducted under Canon Law, this idea of a true contest, although theoretically present, is not always evident in fact. Experience indicates, in reference to marriage cases, that the parties are very rarely in contest with each other, either because the respondent joins with the petitioner in seeking the dissolution of the prior bond or because the re-

[3] Article 128.

[4] Coronata, *Institutiones Iuris Canonici*, III, 1299.

[5] Hughes, *Witnesses in Criminal Trials of Clerics*, The Catholic University of America Canon Law Studies, Num. 106 (Washington, D. C.: The Catholic University of America Press, 1937), p. 85.

spondent is hostile or indifferent to the petitioner's allegations and, therefore, refuses to enter into the proceedings or partakes only in a disinterested and half-hearted fashion.

Thus, in practice, the case usually becomes that of the Petitioner vs. the Defender of the Bond. In this eventuality, it does not seem that equity reigns, if the petitioner's advocate is not admitted into the various hearings, since the Defender of the Bond not only has the right but the duty to be present at all hearings and thus can inform himself of all the sundry ways of upholding the validity of the marriage being contested [6] and can take advantage of all legal rights allowed under the procedural canons.

Most of the laity are not acquainted with the possible grounds of nullity nor with the Canons on procedure, which govern the proper conducting of a canonical trial. For these, they depend on the zealous interest of a trained canonist, who will undertake the presentation and pleading of their case, as their advocate. Without his presence at the trial, the case falls almost completely into the hands of the Defender of the Bond, who aggressively and relentlessly argues for the validity of the given marriage.

There should be a representative of the petitioner present at all the proceedings who can care for the interests of his client, by proposing additional questions, suggested by given answers of the witness, which possibly could not have been known or foreseen at the time, when the original "*positiones*" were offered; by entering an objection to the manner of examination as set forth by the Defender of the Bond, which irregularity may have escaped the notice of the *Instructor;* by taking advantage of all exceptions set forth in the law, which are favorable to the petitioner's cause; by requesting re-examination of witnesses, if further information is required or if controverted points need clarification; by insisting on peremptory decrees or by filing requests for relief from the same; by discovering, at first hand, the attitude and the manner of the witnesses in

[6] Canons 1773; 1968, n. 1; Article 70, § 1.

testifying, as this latter is most important, when the final summary arguments *ex parte* are being given.

In this way, the petitioner would be given a fair chance to present his whole case and the opposition would not have any unfair advantage. Since the Church jealously guards the validity of every marriage and since, in fact, every marriage is presumed valid, until the contrary has been definitely and clearly established by incontrovertible proof,[7] the position of a petitioner in a nullity trial is not an enviable one. For this reason, he must be allowed every legal opportunity to present his entire case *in toto*.

Decisions *"Non Constat"* are given in many instances, when the evidence does not necessarily point to the actual validity of the marriage but rather insufficient evidence is presented to prove the nullity of the contract, and in these latter instances there are undoubtedly many cases where more proof could have been submitted and presented, if an advocate were actually present and took an active part in the proceedings. Again, the moral certitude, required by law, as the basis of a judge's opinion and decision, may not be present because the various testimonies are hopelessly in contradiction and, therefore, cannot possibly present that consistent and constant pattern, which is so necessary for the attainment of truth. Were an advocate at the session, these inconsistencies and contradictions could possibly be reconciled by the insistence of additional questions.

It is true that *ex officio*, the *Instructor* can do much to protect the interests of the petitioner but his assistance is limited, since taking advantage of many legal remedies requires the personal action of the principal or the intervention of the advocate, who possesses the required mandate.

A decision based on insufficient or contradictory evidence, where additional proof could be submitted or where the contradictions could be reconciled or clarified, were the advocate present to avail himself of these opportunities, is not in reality

[7] Canon 1014.

a true decision, with reference to the actual facts, because it does not mirror the complete truth.

Referring back once again to the Instruction "*Provida Mater*" where the right to make an exception is allowed, and the petitioner's advocate is admitted to the legal proceedings, especially the examination of witnesses, it is humbly proposed by the present writer that, viewed in the light of the above, *every* case offers those circumstances which should suggest to the Instructor the right of the advocate to be present [8] and the granting, by decree, in each individual case, of an exception to the general law.

Hogan [9] states: "It is clear that no general permission may be extended to lawyers permitting them to assist at the depositions of witnesses in all matrimonial processes. Nevertheless, in view of the fact that relaxation of this general law is legally possible, the present writer recommends the lodging of a petition for admittance to all hearings of a particular trial. From a consideration of the importance of the defense role, which may be aided considerably by such an attendance, it should not be difficult to adduce motives sufficient to influence the Tribunal. Personal contact would undoubtedly make for a more intelligent evaluation of testimony in the lawyer's brief. It would place him in a more favorable position with regard to the lodging of possible exceptions and to the formulation of subsequent questions. In fact, his presence at times would obviate the necessity of recalling witnesses for further testimony since clarifying questions could be proposed at once. Furthermore, attendance of the legal adviser is the most practical manner of fulfilling what at times might prove an obligation, namely, that of safeguarding his client's rights with regard to precise court reporting." To this end, the same author suggests "that the advocate and procurator enter a plea, founded upon sound

[8] Article 128.

[9] *Judicial Advocates and Procurators*, Catholic University of America Canon Law Studies, n. 133 (Washington, D. C.: The Catholic University of America Press, 1941), pp. 150-151.

reasons, at the beginning of each matrimonial process for admittance to all hearings as permitted by law." [10]

In reference to the above, it should be noted that trials conducted under Canon Law and Civil Law have as their main objective the same goal, which described simply, is the attainment of the truth and, more important, the complete truth relative to the issues being litigated. Unless a given trial succeeds in the attainment of this objective, it has failed to achieve the purpose for which it was conducted and in most instances, there will be verified a grave and serious violation of the virtue of justice. In every case, the alleged rights of the litigating parties are presented to the Bar of Justice for adjudication and unless the complete and entire truth, relative to the issues involved, is investigated and determined, the rights of one party at least are in danger of violation and thus will eventuate a miscarriage of justice.

Prior to the presentation of the *libellus,* the canonical advocate should, after a lengthy and detailed consultation with the petitioner, investigate every particular aspect of the case, as is recommended to every lay attorney, before he pleads a case. This would include a lengthy study of all points of substantive as well as procedural law, which might bear on the issues involved. Furthermore, if at all possible, he should contact and interview in person every witness, so that he might determine beforehand the full extent and type of information, which the witness possesses. In the event that an individual cannot be contacted personally, either because of distance or some other valid reason, a preliminary deposition might be received.

From these personal interviews, the advocate can determine more accurately whether or not there is sufficient evidence to warrant the presentation of the petition and can prepare more intelligent "*positiones*" for the judicial interrogation of the witnesses. In this manner, nothing is left to chance and even before the trial, the petitioner's attorney will have a well-founded idea as to what to expect from each witness and exactly what information they can offer.

[10] *Ibidem,* p. 151.

Also, the advocate should check on all possible types of proof, testimonial as well as documentary and familiarize himself with the most recent advances in the various sciences which might play an important part in the total and complete presentation of all possible proof and evidence.

In this way and only in this way, can it be truthfully said that the interests of the petitioner are being properly safeguarded and that opportunity for a fair hearing is being accorded to him.

In beginning the proper discussion of this paper, i.e., the "Examination of Witnesses," it is best to start with a simple definition of the term, which will embrace all possible types. It might be stated that "in the strictly probatory sense, witnesses are persons other than the plaintiff and respondent, who have observed something with their senses and are then brought to prove, by their assertion, what they have observed. Their assertions, offered in court as proof, are called testimony." [11]

In accordance with their status before the court and the testimony they render, witnesses are divided by the Canon Law into the following groups:

A. *By Reason of Status before the Court.*

Under this heading witnesses may be termed *simple* or *private* witnesses, who testify to what has been casually observed; *authorized* witnesses, who have been appointed to an office that they might observe or do and then testify to acts observed or done in the fulfillment of their office, and *expert* witnesses, who testify with authority in respect to the science, in which they have attained standing or have gained specialist knowledge; into *judicial* witnesses, who testify before the Judge or Auditor and generally at court, and *extra-judicial* witnesses, who render testimony before other persons and out of court; into *summoned* witnesses, who have been officially

[11] Wanenmacher, *Canonical Evidence In Marriage Cases* (Philadelphia, Pa.: Dolphin Press, 1935), p. 113.

called to testify and *spontaneous* witnesses, who appear before the court of their own accord; into *documentary* witnesses, who have signed a document or are mentioned in it as witnesses, and *extraneous* witnesses, who have neither witnessed a document nor are mentioned in it.

B. *By Reason of Testimony Rendered before the Court.*

Under this heading, witnesses may be variously divided into *concordant* witnesses, when two or more testify alike to the same fact and *singular* witnesses, when there is present some variance in the testimony. This variance may be *contradictory,* if there is a true contradiction by the witnesses in respect to the same matter, where a fact is admitted by one and denied by another; it may be *contrary,* when there is essential agreement among the witnesses in respect to the fact but divergent views in reference to the concomitant circumstances; it may be *diversative,* when there is reference to various disconnected events; and finally, the variance may be *complementary,* when the several witnesses testify to distinct occurrences, all of which together give a cumulative proof and " weave together the threads of a complete story."

In addition, by reason of the source of knowledge, witnesses may be classified as those of *personal experience,* who have learned something directly by their own eyes and ears and thus become eye witnesses or ear witnesses, and those of *hearsay,* who come to the knowledge of a fact by hearing of it from some one else. These, in turn, may be *direct* hearsay witnesses if they hear the version from one who directly experienced it or *indirect* hearsay witnesses, if knowledge is derived from a person who is himself only a hearsay witness. The hearsay testimony may concern the *notoriety* of an event, the *general current opinion,* repute or mere *rumor.*

Witnesses, who merely state an *opinion* of their own, are not witnesses in the truest probatory sense. When used in cases of impotency and non-consummation, opinion witnesses are usually called witnesses *septimae manus* and these are *character*

witnesses, when they testify solely about the character traits of the principal and become *opinion* witnesses, if they add the note that in their opinion, impotency or non-consummation is actually verified in the particular case.

Finally, according to their personal position and status, witnesses may be *entirely admissible* and above all suspicion or *inadmissible,* because they fail to meet some definite requirement essential to all witnesses who appear before the court to give testimony.[12]

In general, the above division of witnesses into specific groups, by reason of status and testimony, is also to be found in Civil Law trials, since its basis is the relationship between a given person and a court of law or between the same person and a definite fact or occurrence.

Similar both in Canon and Civil Law is the norm that proof by witnesses is admitted in all cases but always subject to the direction and moderation of the Judge.[13] There is no definite stipulation as to the number of witnesses required or allowed in marriage cases but mention is made in reference to cases of impotency and non-consummation, that each party must bring forth seven character witnesses [14] which number, however, is not required for the validity of the process but the reason must be stated in the *Acta Causae* why a lesser number was used.[15]

As the moderator of the trial, the *Instructor* has the right and the duty of seeing to it that too many witnesses are not admitted.[16] This obviously has reference to the instance where a case has already been definitely proved and the admission of further witnesses would serve no purpose, except to protract the trial unduly. This right and obligation of limiting the number of witnesses would not extend to cases where a

[12] Wanenmacher, pp. 113-118.

[13] Canon 1754.

[14] Canon 1975, § 1.

[15] Wanenmacher, p. 133.

[16] Canon 1762.

great number of witnesses are required to prove the allegations, either because there are many grounds upon which the case has been entered, and different witnesses are required to establish each individual ground, or because the proof can be established only by a lengthy concatenation of related events, which can be described only by many witnesses or because serious discrepancies in testimony or contradictions must be clarified or for any number of similar reasons. In these instances the great number of witnesses cannot be said to be superfluous but, in fact, most necessary and, therefore, a norm, based on mere numbers, would not justify the exclusion of essential witnesses.

In trials in Civil Law, it is generally held that the court (i.e. the judge) in its discretion, may direct the order in which witnesses shall be called, but in practice, the determination of sequence, in the introduction of evidence, is, of necessity, ordinarily left to the trial lawyer.[17] The court seldom interferes except to accommodate a particular witness and, in fact, an unwarranted interference by the court has been held to constitute error.[18]

Since the value of testimony depends entirely upon the triple supposition that the witness has not erred in perceiving, correctly remembers what he perceived and will not deceive the court in giving his testimony, and since most persons possess these qualifications, the Canon Law states in general that all persons can be witnesses unless they are explicitly rejected by the law either absolutely or partly.[19] However, in specifying exactly when the above essential qualities are lacking, the Code sets forth, under three distinct headings, those who are to be rejected as witnesses:

1) *Those unfit to give testimony.* In this category are listed persons who have not attained the age of puberty and the weak-minded.

[17] Maddox v. Eatonton, 8 Ga. app. 817, 70 S.E. 214; Chivala v. Herbert, 138 Ill., app. 371.

[18] Brown v. State 88 Miss. 166, 40 So. 737.

[19] Canon 1756.

2) *Those who are to be considered as suspect.* Here are included: a) Excommunicated persons; b) Perjurers; c) Persons branded as *Infames* after a declaratory or condemnatory sentence; d) Persons who are not considered trustworthy because of bad morals; e) Public and bitter enemies of the contesting parties.

3) *Those who are disqualified.* a) Those who are parties to the case or those who take the place of the parties, e.g., guardian in the case of a minor, a superior or administrator in the case of his community or pious institute which he represents in court.

b) The judge and his assistants, the advocate and others who assist or have assisted the parties in the same case.

c) Priests in reference to all things of which they gained knowledge from sacramental confession, even though they have been freed from the seal of confession. Whatever has been heard by anyone and in any manner on the occasion of the confession, cannot be accepted even as an indication of the truth.

d) Husbands in the case of their wives and vice-versa; blood relations and relations by marriage in the case of persons related to them in any degree of the direct line and in the first degree of the collateral line, except in cases which deal with their civil or religious state, the knowledge of which cannot be had from other sources, and when the public welfare demands that the truth be ascertained.[20]

By way of exception, however, blood relations and relations by marriage in any degree of the direct line and in the first degree of the collateral line are permitted to be witnesses in marriage cases.[21] Since the religious status of persons is involved, the public good demands the ascertainment of complete truth and, in most instances, relatives are the only ones who have knowledge of the intimate details concerned with the personal life of a married couple.

[20] Canon 1757.

[21] Canon 1974; Instruction, Article 122.

Despite the above general rejection of persons, classified as unfit or suspected, from acting as witnesses in ecclesiastical trials, a judge may admit them as witnesses and examine them, if he feels that it is advisable and will help in eliciting complete truth or in discovering sources of proof or evidence of which the tribunal was hitherto unaware. In this eventuality the judge must issue a decree in which he sets forth the reasons why he has deemed the examination of these persons expedient since a *monitum* is given that in general, persons unfit or suspect, should not testify under oath.[22]

As to the time and mode of rejection of witnesses, the law states that witnesses must be rejected *ex officio* by the judge, if it is evident that they are forbidden to testify, with the explicit exception being made in favor of the judge's admitting unfit and suspected persons as witnesses and examining them, if he is convinced that their testimony is useful. Also on the demand of the adverse party, a person must be rejected if a just reason for his rejection is proved. A party, however, cannot object to the admission of a witness whom he himself presented, unless a new reason for objecting to him has come to his attention, after he had submitted his name to the court. This limitation does not apply to a possible objection to the testimony of a party's own witness. A peremptory injunction insists that any objection to the person of a witness must be lodged within three days after the names of the witnesses have been made known to the party and any later objection will not be heard unless the party proves or, at least, affirms under oath that he did not previously know of the defect of the witness.[23]

The judge is instructed to postpone any discussion on an objection to a witness until the end of the trial, unless a presumption of law stands against a witness, or his defect is notorious or the reason for the objection can be immediately or

[22] Canon 1758; Instruction, Article 120; Doheny, *Canonical Procedure in Matrimonial Cases* (Bruce: Milwaukee, 1948), Vol. I, p. 355.

[23] Canon 1764.

easily proved whereas it could not be proved at a later date.[24]

The Civil Law also has regulations affecting the admissibility of persons as witnesses. By way of a general norm, any person may testify in a civil or criminal case, unless he is one of a class of persons declared incompetent by some prevailing rule of the common law or by express statute. Some of the common law rules prevail as such in a few of the States, while in others, statutes have been passed redeclaring some of the common law rules and expressly abrogating others. In many states comprehensive statutes have been passed prescribing the qualifications of witnesses and providing for the exclusion of certain classes of persons as witnesses. If there are no constitutional restrictions, the state, by enactment of the legislature, does have plenary power to establish the various qualifications of witnesses.[25]

The competency of witnesses in trials conducted under federal jurisdiction is determined under the Federal Rules of Civil Procedure, in accordance with the rules at common law with modifications constituted by the federal statute. This is a decided change from the previous practice, which dictated that such competency was to be determined, in each individual instance, by the law of the State where the trial was conducted.[26]

In general, both the common law and state statutes require, in order that a person be competent to act as a witness, that he be of sound mind, of sufficient age, without physical disability, which would impede or make impossible the giving of coherent and understandable testimony, possessed of a basic belief in God, without previous criminal record, impartial and unbiased, not bound by marriage to either of the parties in contest and not associated at present or previously associated with either of the principals as attorney or legal adviser in respect to a matter which is now the basis of or related to the contested issue.

[24] Canon 1764.

[25] Burk v. Putnam, 113 Ia., 232, 84 N. W. 1053.

[26] Busch, *Law and Tactics in Jury Trials* (Bobbs-Merrill Co. Inc., Indianapolis, 1949), sec. 240.

Each one of these essential qualifications requires and deserves a brief explanation:

1) *Persons of Unsound Mind.* By the rules of common law and the statutes of the several States, persons are incompetent to act as witnesses, if they are judged to be "*non compos mentis.*" [27] Judicial discretion must be invoked to determine the possible statutory exclusion in a case where the alleged mental deficiency falls short of general insanity.[28] In each instance the determining norm will be the individual's capacity for discernment and expression and in addition his ability to understand and appreciate the nature of an oath and his duties as a witness.[29]

2) *Children.* The rules of common law indicated no precise age below which a child was deemed incompetent to act as a witness.[30] Some States, by legislative enactment, have fixed a definite age below which infants are either conclusively or presumptively deemed incapable of testifying as witnesses. However, in the general "*modus operandi*" of most States, by reason of the common law rules or statute, the determining factor in admitting or excluding to the role of witness an infant of tender years is his apparent capacity and intelligence or lack thereof, his ability to appreciate the difference between truth and falsehood and the actual comprehension and conviction of his obligation to tell the truth.[31] Ultimately, a decision in this matter is to be based on sound judicial discretion and the right to make such is vested in the court.[32] In practice and under

[27] Pittsburgh & W. R. Co. v. Thompson, 82 F. 720; Ray v. State, 32 Ga. app. 513, 124 S. E. 47.

[28] Birmingham R. L. & P. Co. v. Jung, 161 Ala. 461, 49 So. 434; Sandes v. State, 175 Ark. 61, 296 S. W. 70; People v. Nagy, 199 Cal. 235, 248 Pac. 906.

[29] Ruocco v. Logiocco, 104 Conn. 585, 134 Atl. 73; Owen v. Comm., 181 Ky. 257, 204 S. W. 162.

[30] Wheeler v. U. S., 159 U. S. 523, 16 S. Ct. 93, 40 U. S. (L. ed.) 244; Petty v. State, 224 Ala. 451, 140 So. 585.

[31] Wheeler v. U. S., 159 U. S. 523, 16 S. Ct. 93, 40 U. S. (L. ed.) 244; People v. Peck, 314 Ill. 237, 145 N. E. 353.

[32] Petty v. State, 224 Ala. 451, 140 So. 585; People v. Pearson 41, Cal. app. (2nd) 614, 107 Pac. (2nd) 463.

certain conditions, children of five, six or seven years of age were considered to be competent,[33] while, under different conditions, children of the same or greater age have been held to be incompetent to act as witnesses.[34]

3) *Persons under Physical Disability.* Under the prescriptions of common law, deaf and dumb persons were classed as idiots and were considered incompetent to act as witnesses,[35] but the present day determination is that such an affliction *per se* does not disqualify [36] and a victim of this condition may be admitted by the court, provided he has sufficient mental acumen to be observant, understands the nature and obligation of an oath and is able to communicate to the court the facts of which he has knowledge either in writing or by the use of signs which are translated by an interpreter and then given due expression, which is understandable to the court.[37] The mere fact that an individual is aged, infirm, ill or has difficulty in expressing himself, does not automatically disqualify him as a witness.[38]

4) *Atheists.* At common law, atheists were held to be incompetent as witnesses,[39] because the entire credibility of an individual's testimony relied on his religious conviction of the heinousness, in the sight of God, of the crime of perjury. Despite this proscription, the broad outlines of the state constitutions and legislative enactments have been judicially inter-

[33] Wheeler v. U. S. 159 U. S. 523, 16 S. Ct. 93, 40 U. S. (L. ed.) 244; People v. Peck, 314 Ill. 237, 145 N. E. 353.

[34] Johnson vs. State, 76 Ga. 76; Hollaris v. Jankowski, 315 Ill. app. 154, 42 N. E. (2nd) 859.

[35] State v. Howard, 118, Mo. 127, 24 S. W. 41.

[36] State v. Smith, 203, Mo. 695, 102 S. W. 526; State v. Weldon, 39 S. C. 318, 17 S. E. 688.

[37] Ritchey v. People, 23 Colo. 314, 47 Pac. 272, 384; Synder v. Nations, 5 Blackf. (2nd) 295.

[38] Stephens v. State, 17 Ala. app. 548, 86 So. 111; Roberson v. State, 49 S. W. (Tex.) 398.

[39] Beason v. State, 72 Ala. 191; Ruocco vs. Logiocco, 104 Conn. 585, 134 Alt. 73; State v. Curtin, 28 Del. 518, 95 Atl. 232.

preted as lifting the common law disqualification of atheists with definite exceptions being made in regard to the provision of the Alabama Constitution and a Maine statute for religious toleration, where judicial interpretation has been rendered to the effect that these do not remove the common law disqualification.[40]

5) *Persons Convicted of Crime.* Under the tenets of common law, a person was deemed incompetent to testify, if he had been previously convicted and sentenced in a court subject to English Law in the case of an infamous crime, e.g., treason, murder or other crime punishable by death, or convicted and sentenced for the commission of crime classified as *crimen falsi,* e.g., perjury, counterfeiting, false pretenses and any other crime which involved false swearing, obstructing the administration of justice, fraud or deceit.[41]

Most state statutes have considerably changed the rulings of common law and now provide that a previous conviction and sentence for the commission of any crime will *not* disqualify a person from acting as a witness but such may be shown to affect substantially his credibility. However, a few States provide that conviction and sentence for specified crimes, which affect the credibility of a witness (e.g., perjury, subornation of perjury and like crimes) do disqualify. In any event, in order to constitute a disqualification, the conviction alone is not sufficient but must be accompanied by a subsequent sentencing, unless, in a particular case, the statute clearly provides to the contrary.[42]

In regard to the sentence imposed for the commission of a crime which would disqualify, it has been held that where the sentence has been suspended either on the recommendation of the jury or by the court on its own motion, the disqualifica-

[40] Wright v. State, 24 Ala. app. 378, 135 So. 636; Smith v. Coffin, 18 Me. 157.

[41] Busch, sec. 240.

[42] Bishop v. State, 41 Fla. 522, 26, So. 703; Bradley v. Comm. 245 Ky. 101, 53 S. W. (2nd) 215.

tion, nevertheless, applies.[43] Although the common law did not recognize that full service of the imposed sentence restored competency, the contrary is now held to prevail in some States under specific statutes.[44] Now, it is the general opinion that a pardon, granted in favor of a person who had previously been convicted and sentenced for a crime, which carried with it the added penalty of disqualification, restores such a person to full competency.[45]

6) *Persons in Interest.* At common law parties to a contest and persons who, though not parties, stood to benefit or suffer a detriment as the result of the action were incompetent as witnesses.[46] With the exception of the exclusion of testimony of interested persons in actions or claims against the estates of deceased or incompetent persons, this disqualification of the common law is removed by the statutes of all of the States.

Likewise, in a criminal case under the common law, a defendant was not a competent witness in his own behalf but disability has been removed in England and all of the States except Georgia, and now said defendant, while not compelled to give evidence against himself, may, if he chooses, take the stand in his own defense and subject himself to examination and cross-examination, the same as any other witness.[47]

7) *Incompetency of Parties and Others in Interest to testify in actions by or against the personal representatives or survivors of deceased or incompetent persons.* There is a disqualification as a witness for interested persons in actions by or against the personal representatives, heirs, legatees and de-

[43] Owen v. State, 86 Ark. 317, 111 S. W. 466; Brown v. State, 86 Tex. Cr. R. 8,215 S. W. 323.

[44] U. S. v. Hughes, 175 F. 238; Quiltin v. Comm. 105, Va. 874, 54, S. E. 333.

[45] Logan v. U. S., 144 U. S. 263, 12 S. Ct. 617, 36 U. S. (Leg. Ed.) 429, Thompson v. U. S., 202 F. 401, 47 L. R. A. (N. S.) (206).

[46] Grimes v. Booth, 19 Ark. 224; People ex rel. Bradford v. Arcega, 49 Cal. app. 239, 193 Pac. 264; Marston v. Carr. 16 Ala. 325; McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689.

[47] Goodwin v. Fox, 129 U. S. 601, 9 S. Ct. 367, 32 U. S. (L. Ed.) 805; St. Louis and S. F. R. Co. v. Savage, 163 Ala. 55, 50 So. 113.

visees of a deceased person, or by or against the conservator or guardian of any insane or distracted person. The purpose of this statutory exception is to protect the estates of deceased or incompetent persons against possible injustice through the actions of interested persons, whose testimony as to transactions, had with the deceased in his lifetime, or with one who subsequently becomes incompetent, if permitted, would necessarily go uncontradicted and open the door to fraud and perjury.[48]

The statutes of the several States, while differing in their terms and applications, usually provide that where an adverse executor, administrator, heir, devisee, legatee, conservator, guardian or other representative of or successor in interest to the estate of the deceased or to an incompetent person introduces evidence as to transactions or communications with a person now deceased or one who subsequently became incompetent, an interested party or person affected by such evidence may take the stand to deny it.[49] Generally, the introduction of such evidence does not make the adversely interested party or person a competent witness for any purpose beyond legitimate rebuttal of the offered testimony.[50]

8) *Husband and Wife as Witnesses for or against each other.* Usually at common law, a husband and wife were disqualified as witnesses for or against each other in any proceeding to which the other was an actual or interested party.[51] However, a general exception was made in cases where the suit concerned offences against the person of the wife.[52]

[48] Busch, sec. 240.

[49] Bladwin Co. v. Howard Co., 238, F. 154, cer. den. 243 U. S. 636, 37 S. Ct. 400, 61 U. S. (L. Ed.) 941; James v. James, 64 Colo. 133, 170 Pac. 285; Allen v. McGill, 311 Ill. 170, 142 N. E. 470.

[50] Guild v. Eastern Trust and Banking Co., 125 Me. 292, 133 Atl. 164; Harper v. Corcoran, 166 Mich. 474, 132 N. W. 106.

[51] Lucas v. Brooks, 18 Wall. 436, 21 U. S. (L. Ed.) 779; Jin Fuey Moy v. U. S., 254 U. S. 189, 41 S. Ct. 98, 65 U. S. (L. Ed.) 214.

[52] Ex parte Beville, 58 Fla. 170, 50 So. 685, 27 L. R. A. (N. S.) 273.

In the United States, the admissibility of spouses as witnesses for or against each other is governed entirely by particular state statutes and these vary widely both as to substance and detail. In some jurisdictions, the disqualifications, set forth in common law, have been practically removed;[53] in others, such disqualifications as presently exist are specifically limited to confidential communications;[54] in still other States the disqualification is removed entirely in civil cases.[55] In virtue of some enactments, a husband or wife is made a competent witness in criminal cases *for* but not *against* the other.[56]

In general, either by virtue of an express statute or as an exception to the common law rule, in an action against either of them, the husband or wife of a party is competent to testify regarding transactions in which he or she acted as the agent of the other,[57] and also the wife is admitted to testify in actions relating to her separate property, even though her husband may be joined as a party.[58] Unless, however, it is specifically provided for by statute, it is generally held that a husband may not testify for or against his wife with reference to her separate property, other than to a transaction in which he has acted as her agent.[59]

The specific statutes of the several states have generally removed testimonial disqualifications in actions between hus-

[53] Whitfield v. State, 85 Fla. 142, 95 So. 430; Vukodo-Novich v. State, 197, Ind. 169, 150 N. E. 56.

[54] Dunn v. Heasley, 375 Ill. 43, 30 N. E. (2nd) 628; State v. Pizzolotto, 209 La. 644, 25 So. (2nd) 292.

[55] Smith v. State, 13 Ala. app. 411, 69 So. 406, 193 Ala. 680, 69 So. 1019; Malone v. Harlin, 220 Mo. app. 102, 278 S. W. 806.

[56] Brister v. Dunaway, 149 Miss. 5, 115 So. 36; State v. Kadat, 158 Mo. 125, 59 S. W. 73.

[57] Robison vs. Robison, 44 Ala. 227; Franks v. Rogers, 156 Ark. 120, 245 S. W. 311.

[58] Johnston v. St. Sure, 50 Calif. app. 735, 195 Pac. 947; Skahen v. Strauss, 194 Ill. app. 403.

[59] Berlin v. Cantrell, 33 Ark. 611; Woodward v. Lindley, 43 Ind. 333.

band and wife, e.g., divorce, separate maintenance and annulment.[60] Both under the rules of common law and individual statutes, a husband or wife is allowed to testify against the other in the prosecution of the one for an offense committed against the other.[61]

Since statutes, which abrogate or modify the common law rule of incompetency of spouses to testify for or against each other in actions to which either is a party, derogate from the common law, they are subject to strict interpretation.[62]

9) *Lawyers as Witnesses to matters arising during Attorney and Client Relationship.* The common law, which is followed with very little deviation in all of the States, stipulates that an attorney, over the objection of a present or past client, may not testify to any confidential communication made to him by such client or to information obtained by him in reference to his client's cause during the attorney-client relationship.[63] This privilege against disclosure is the client's,[64] and may be waived by him either expressly or implicitly.[65]

To warrant the client invoking this privilege, there must have existed a bona fide attorney-client relationship.[66] The communication must have been confidential [67] and related di-

[60] Scarborough v. Scarborough, 54 Ark. 20, 14 S. W. 1098; Lowry v. Lowry, 170 Ga. 349, 153 S. E. 11, 70 A. L. R. 488.

[61] U. S. v. Mitchell, 137 F. (2nd) 1006; Halley v. State, 108 Ark. 224, 158 S. W. 121.

[62] Kriman v. Hutchinson, 254 Ill. app. 469; Holman v. Backus, 73 Mo. 49.

[63] Hickman v. Taylor, 153 F. (2nd) 212; Johnston v. Fondren, 204 Ala. 656, 87 So. 94.

[64] Robinson v. U. S., 144 F. (2nd) 392; People v. Horowitz, 70 Cal. app. (2nd) 675, 161 Pac. (2nd) 833.

[65] Hill v. Hill, 106 Colo. 492, 107 Pac. (2nd) 597; Kelley v. Kelley, 158 Kans. 719, 150 Pac. (2nd) 347.

[66] Robinson v. U. S., 144 F. (2nd) 392; in re Dupont's estate, 60 Cal. app. (2nd) 276, 140 Pac. (2nd) 866.

[67] Hill v. Hill, 106 Colo. 492, 107 Pac. (2nd) 597; Blaylock v. Satterfield, 219 N. C. 771, 14 S. E. (2nd) 817.

rectly to the client's cause [68] and to a legitimate transaction.[69]

The determination as to whether the necessary circumstances for the invoking of this privilege are, in fact, present is to a great extent within the discretion of the trial court and the decision is subject to review only if that discretion is abused.[70]

As to the right to call witnesses, the Canon Law prescribes that they are to be introduced by the parties, either directly or vicariously through their advocate, and adds that they can also be introduced by the Promoter of Justice and Defender of the Bond, if these officers intervene in the process and by the judge himself, *ex officio,* if the trial involves minors or others equivalent in law to minors, or whenever the public good (i.e., the attainment of complete truth) demands it.[71]

In trials conducted under Canon Law, the judge has the right and the obligation to restrict the number of witnesses called by either party, so that the total will not be too numerous and thus safeguard against useless witnesses being examined.[72] This right is not, however, subject to the arbitrary whims of an individual judge, who attempts to restrict the gaining of legitimate evidence, whereby the complete truth will be obtained; for, in that instance, there would be a serious miscarriage of justice and a grave violation of the inherent rights of the parties. This conclusion is amplified in the Instruction of the Sacred Congregation of the Sacraments, which points out that this right of the judge is to be invoked by decree merely to prevent possible abuses when supernumerary witnesses are introduced " for a matter that is not strictly rele-

[68] Modern Woodman of America v. Watkins, 132 F. (2nd) 352; McKnew v. Superior Court of City and County of San Francisco, 23 Cal. (2nd) 58, 142 Pac. (2nd).

[69] U. S. v. Bob, 106 F. (2nd) 37; Sawyer v. Stanley, 241 Ala. 39, 1 So. (2nd) 21.

[70] Steiner v. U. S. 134 F. (2nd) 931.

[71] Canon 1759, §§ 1, 2, 3; Instruction, Article 123, § 1.

[72] Canon 1762.

vant to proof or which has no necessary connection with it; and generally when the witnesses are introduced to cause delays or to inflict harm on the other party or when the case is considered sufficiently developed by fewer witnesses." [73]

Under civil law practice, witnesses are usually brought forth for testimony before the courts by the parties through their respective counsel but, in certain circumstances, the presiding judge has the authority, *ex officio,* to summon witnesses, if he prudently decides that such procedure is in the best interest of truth and justice.

In appropriate situations, the court may place a reasonable limitation upon the number of witnesses to be called. Examples of such circumstances, which have already been reviewed by the courts, include *character witnesses,*[74] *expert witnesses,*[75] *witnesses to property values.*[76] Any restriction must be reasonable; for any unreasonable limitation has been held to be an abuse of discretion and thus constituted error.[77] The general interpretation is that a trial court has no right or authority to limit the number of witnesses to controlling facts in a case where such facts are matters of evidentiary dispute.[78]

In Canon Law it is directed that when proof by witnesses is demanded or indicated by the circumstances of the case, the parties or their advocates are to file with the tribunal a complete list containing the full names and present addresses of all witnesses, whose testimony they request.[79] If this matter

[73] Article 123, § 2.

[74] Bays v. Hunt, 60 Ia. 251, 14 N. W. 785; State v. Burkholder, 42 Kans. 641, 22 Pac. 722.

[75] Hilliard v. Beattie, 59 N. H. 462; Sixth Avenue R. Co. v. Metropolitan El. R. Company, 138 N. Y. 548, 34 N. E. 400.

[76] Huelt v. Clark, 4 Colo. app. 231, 35 Pac. 671; Union R. Transfer and Stockyard Co. v. Moore, 50 Ind. 458.

[77] Haag v. Cooley, 33 Kans. 387, 6 Pac. 585; Page v. Krekey, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409.

[78] Green v. Phoenix Mut. Life Ins. Co., 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; Barkyte v. Summers, 68 Mich. 341, 36 N. W. 93.

[79] Canon 1761, § 1; Instruction, Article 125.

has not been cared for by the last day, which has been peremptorily set by the judge, it is believed that the party has, in effect, withdrawn his prior request for the summoning of witnesses.

Not only must the list of witnesses be filed with the tribunal but in addition the names of all witnesses must be made known, in due time, to the other interested party, so that he may, if he judges it to be necessary or expedient, lodge an objection with the tribunal, within three days of notification, challenging the very person of the witnesses.[80] This notification will usually be done by the tribunal notary, who will make use of the court messenger or the mails, and who will be careful to keep an exact record of the date on which this notification was made, to ensure that any objection is lodged within the appropriate time.[81]

Rejection of the witness will usually be accomplished *ex officio* as often as it is evident that the person is not competent to give testimony. However, the adverse party has the right to petition for the rejection of a witness and this request will be honored, if a just cause for exclusion is shown to be present. The party himself, who introduces a particular witness, has not the liberty to seek his rejection, unless said party can prove that the cause, which now warrants the exclusion, occurred only after the witness's name had been submitted. When there is no possibility for the party to exclude one of his own witnesses, he may reprobate this witness's testimony. Any petition for the rejection of a witness must be filed with the tribunal within three days of notification by the party of the person of the witnesses, and this request cannot be made after the expiration of this peremptory period, unless the party proves or at least affirms under oath that he was not previously aware that any defect was present, which now warrants the exclusion of the witness. In all cases of petition to exclude a witness, the judge is counselled to postpone hearing on this

[80] Canon 1763; Canon 1764, § 4; Instruction, Article 126, §§ 1,2.

[81] Doheny, p. 363.

incidental question until the important matters of the trial have been investigated, unless a "*presumptio iuris*" against the witness is said to be present, or the basis for his disqualification is notorious or such defect can be immediately and more easily established at an earlier time, whereas it would become impossible to prove at a later date.[82]

There is no provision in the Civil Law which requires or necessitates the notification either of the court or of the other party of the persons who are to act as witnesses. In fact, in most instances, these will not in any way be known or identified until the attorney, in open court, asks each one, in his separate turn, to come forward and to take the stand.

The appearance of a witness in a trial, conducted under Canon Law, is theoretically assured by means of a citation or summons, which is issued to him by the judge, who has the jurisdiction to interrogate him. The service of this summons is to be accomplished either personally by the tribunal cursor, by registered mail with a return receipt or by edict and all of the requirements, demanded by the Code of Canon Law for the legal citation of an adverse party and the provisions set forth in this matter are applicable to the citing of witnesses.[83]

In Civil Law, as it is usually practiced, there is no general summoning of all witnesses, as was presently described under the Canon Law. Witnesses are generally informed by the attorney of the party, in whose favor they are being called, of the place, date and time of the trial and are requested to be present. Only if the attorney fears that the witness, for any reason, personal or otherwise, might not appear, or if the witness happens to be an official or authoritative witness, is a summons for his appearance issued. In this eventuality, the attorney will make application, for such a summons, at the office of the clerk of court, in the jurisdiction where the trial will take place, and the legal summons will be drawn up. This having been accomplished, it is handed over to a sheriff, constable or some other recognized official, who will serve the summons personally on the witness.

[82] Canon 1764.

[83] Canon 1765.

In this connection, it might well be pointed out that a civil court cannot issue a summons for a person who resides outside the confines of the State, or in any way compel him to appear. To relieve this difficulty, provision has been made in the law for written depositions to be served on the witness and this particular point will be referred to more completely in respect to another matter.

Under the provisions of Canon Law, once a witness has been duly cited, he has no choice but must appear or make known in advance to the judge the cause of his non-appearance. If a witness, without notifying the tribunal in advance does not appear, or if he does appear, refuses to testify or to take the oath or to sign his testimony, fitting penalties can be inflicted on him by the judge, which can include, in addition, fines in proportion to the damage or loss sustained by the parties.[84]

In Civil Law if no summons was served on the witness, by reason of the previous description given above, his non-appearance cannot, in any way, be punished, for he has received no legal notification of the trial. If, however, a summons was issued and actually served on the witness, his obstinancy, in not appearing, will be punished in criminal proceedings by prosecution and conviction for contempt of court.

In the case of a witness, who appears voluntarily and without a citation being issued, the Code of Canon Law prescribes that the judge may admit or reject his testimony, as is deemed best in his prudent judgment, but he must reject him if he is convinced that the voluntary appearance was entered either to delay the trial or to obstruct justice and truth.[85]

In Canon Law, once a witness has been duly cited, he has no personal choice but must honor the citation and must testify, by truthfully answering the questions legitimately proposed to him by the judge.[86] An exception, excusing them from testifying, is made in behalf of the following: "pastors and other

[84] Canon 1766, §§ 1, 2.

[85] Canon 1760; Instruction, Article 124.

[86] Canon 1755, § 1; Instruction, Article 121.

priests in respect to those matters which come to their attention by reason of their ministry outside of sacramental confession; civil magistrates, doctors, mid-wives, lawyers, notaries and others who are bound to professional secrecy by reason of advice given in connection with matters related to this secret. Exception is also made in favor of persons who fear that their testimony may give rise to defamation, dangerous quarrels or other grave evils for themselves, or their blood relations or relations by marriage in any degree of the direct line or in the first degree of the collateral line." [87]

A witness, duly cited in the manner prescribed by the Civil Law, must answer the legitimate questions proposed to him by respective counsel or by the court and failure or refusal to reply subjects the witness to possible prosecution for contempt of court.

One exemption from the obligation of a witness to answer particular questions is noted in favor of privileged communications. At common law there was only one class of privileged communications — that existing between attorney and client. However, by appropriate statutes of the several States, this list has been increased to include those communications between physician and patient, between spiritual adviser and layman and in some jurisdictions, the information, possessed by registered nurses, is considered to be privileged.[88]

It is to be noted that relations by blood or marriage are not exempt in the Civil Law from testifying in cases involving their relatives, even if great hardship is present, except in the one case of husband or wife testifying in a suit to which the other is a party, as was previously described.

The witness in Canon Law must not only answer the legitimate questions of the judge but he must answer them truthfully. Any witness who knowingly lies or in any way conceals the truth is to be punished by the judge by temporary exclusion from the performance of legitimate ecclesiastical acts and

[87] Canon 1755, § 2, 1°, 2°; Instruction, Article 121.

[88] Woywod, *Practical Commentary on the Code of Canon Law* (2 Vols., New York, Joseph F. Wagner, 1943), Vol. II, p. 268.

if this lie occurs after he has taken an oath to speak the truth and thus constitutes the graver crime of perjury, the witness is to be visited by personal interdict, if he is a layman, or by suspension, if he is a cleric. In addition, any person who presumes to entice any witness or expert by gifts, promises or by any means to give false testimony or to conceal the truth, is to be punished with the above penalties.[89]

Lying and perjury are also considered to be grave evils and serious crimes in the Civil Law and due provisions are made for the prosecution and conviction in instances where a complaint has been filed with the court or judicial notice has been taken by the court *ex officio*.

As to the place where witnesses will testify, the Code of Canon Law gives, as the general and usual rule, the hall of the tribunal. However, it recognizes by reason of attendant circumstances, several exceptions: Cardinals, Bishops and illustrious personages, who are exempted, by the law of their government, from appearing before a judge to testify; these can choose the place where they will give their testimony and having made the choice, they should inform the judge.

Those who are detained by illness or any other physical or mental disability or by reason of station in life and thus cannot appear in person at the tribunal, are to heard at their homes.

Those who are staying outside the diocese and cannot, without grave inconvenience, return to the diocese and give testimony at the tribunal, are to be heard by the tribunal of the place where they are staying and interrogated in accordance with the questions and instructions forwarded by the judge who has jurisdiction in the case.

Persons who reside within the confines of the diocese but in places so remote from the seat of the tribunal that they cannot appear in person, without great inconvenience, and the judge cannot travel to them, are to be interrogated by a local priest who is worthy and suitable to undertake this mission and has been properly delegated by the judge. In this instance, the

[89] Canons 1755, § 3; 1743, § 3.

delegated priest, with the assistance of another, who will assume the office of notary, will propose to the witness the questions forwarded to him by the judge, and, in addition, will abide by any and all instructions transmitted to him.[90]

The Civil Law similarly insists, if it is at all possible, that the witnesses appear in person before the court and subject themselves to direct and cross-examination. However, the rules of procedure recognize necessary exceptions, especially in favor of the aged, the ill and the infirm and also persons who reside outside the jurisdiction of the court and are, therefore, not subject to judicial summons.

In these exceptional cases, the attorney, who is calling these particular witnesses, will prepare a set of interrogatories, which will be forwarded to the locale of the prospective witness, there served upon him, and with his answers recorded ultimately returned to the original sender. The attorney must then beg the court's permission to submit this deposition as an evidentiary exhibit, for its admission is regulated by the rules governing hearsay testimony. In any event, if the permission is granted without objection from the adverse party, the testimony is to be given the same weight and consideration, in the final evaluation, as if it had been given orally before the court.[91]

As was stated previously, the parties in trials conducted under Canon Law, will not ordinarily be present while the various witnesses are testifying, but, by way of exception, they can be admitted provided the *Instructor,* in his prudent judgment, decides that their presence is necessary or will serve some useful purpose.[92] However, as was suggested at the outset, it is the considered opinion of this writer that the party's advocate should be present at all proceedings, including the examination of the witnesses, and that ordinarily the circumstances

[90] Canon 1770.

[91] Belser v. American Trust Co., 125 Cal. app. 344, 13 Pac. (2nd) 951; Garner v. State Banking Co., 150 Ga. 6, 102 S. E. 442.

[92] Canon 1771; Instruction, Article 128.

of each case will dictate that the judge issue a decree to this effect.

By a right accorded to them by the general law of the Code, the parties or their procurators can be present when each witness takes his oath to speak the entire truth and this to insure the fact that the oath is taken by the witness and that it is administered to him in accordance with the accepted and traditional formulary.[93] The only limitation placed on this right might be the fact that the complete list of witnesses had not previously been exchanged by the parties, because some grave difficulty was present or foreseen and, in this eventuality, it would be best to exclude the party from the oath-taking ceremony of the adverse party's witnesses.[94]

In Civil Law trials there is no question of any provision for the exclusion of the principals from any of the legal proceedings, and thus they and their respective attorneys may always assist at the examination of all witnesses, both their own and those of their opponents.

In accordance with the prescripts of Canon Law, each witness is to be examined separately and by himself, in the absence of all other witnesses.[95] The reason for this particular regulation is to assure, in so far as it is humanly possible, that one witness will not in any way influence another, there always being the opportunity for a witness, while listening to another giving testimony, to convince himself of having knowledge about facts, which are being presented by the present witness. Also, there is danger that a witness, having certain knowledge, might change his answers to conform to the statements made by one of the previous witnesses, so that he might not be alone in giving variant testimony. In addition, the opportunity to hear others would give a witness the occasion to prepare a more elaborate statement, and one

[93] Canon 1767, § 2.

[94] Canon 1763.

[95] Canon 1772, § 1.

which might not be in conformity with truth, in order to contradict the testimony of those who had preceded him.[96]

It is suggested that a witness, who has completed his examination, should not be given any opportunity to be with or converse with witnesses who are awaiting their interrogation, lest he divulge the specific nature of the questions or in anyway attempt to influence their testimony. Again, the judge is counselled to divide the examination into several distinct sessions so that the danger of collusion might be minimized. In this eventuality, the oath to preserve the secret, if sincerely taken, should guarantee complete honesty and freedom from any intimidation or other fraudulent practice.[97]

The Civil Law also provides for the sequestration of witnesses on the belief that where there are a number of witnesses to a single occurrence, they will, if permitted to hear each other testify, consciously or unconsciously harmonize their stories, and if one of them falls victim to a sharp cross-examination, the others will be forewarned and will avoid the same pitfall. Also, adverse witnesses, who are in a courtroom listening to other witnesses undergoing cross-examination, may be so overcome by dread of the ordeal, that, to avoid it, they will considerably soften their direct testimony.[98]

Either party to an action may, before any evidence is offered and even before the opening statements by the attorneys, submit a motion for the exclusion from the courtroom of all of the witnesses excepting the one presently to testify. The rule, when entered, applies, with exceptions later to be noted, to all witnesses on both sides but does not affect the parties to the action nor their counsel.[99]

A party is not entitled to such a rule of exclusion as a matter

[96] Whalen, *The Value of Testimonial Evidence in Matrimonial Procedure*, The Catholic University of America, Canon Law Studies, num. 99 (Washington, D. C.: The Catholic University of America, 1935), p. 174.

[97] Coronata, *loc. cit.*, p. 213; Lega-Bartoccetti, *Commentarius in Iudicia Ecclesiastica* (Romae, 1950), Vol. II, p. 707.

[98] Busch, sec. 235.

[99] Busch, sec. 234.

of right, for the granting or refusal of it rests in the sound discretion of the court.[100] There are some cases which hold a contrary view but these are in jurisdictions where the separation of witnesses is provided for by statute, or the circumstances made known to the court obviously demanded such an exclusion and the court's denial of the motion was held to be an abuse of discretion.[101]

A witness may be subject to punishment for contempt in the violation of the rule.[102] In extreme cases, as when the offending witness is an interested party, it has been held that the court may properly refuse to permit him to testify.[103] If the violation of the exclusion order is intentional and the testimony of the witness goes directly to the matter in controversy, the court may refuse to permit him to testify. If, on the other hand, the violation has been unintentional and the witness is to testify as an expert or to some phase of the case not decisive of the point in issue, or where the witness is to testify in rebuttal only, the court may, in its discretion, permit the witness to testify.[104]

Expert witnesses, character witnesses, and medical witnesses are usually exempted from such an exclusion rule,[105] but they may, in the court's discretion, be included.[106] Under particular circumstances, the court may exempt from the rule an agent of a party, whose presence is deemed necessary to assist counsel during the trial.[107]

[Part II of this subject will appear in the October issue of *The Jurist* for the current year.]

[100] Mitchell v. U. S., 126 F. (2nd) 550; Tegue v. State, 245 Ala. 339, 16 So. (2nd) 877; People v. Lung, 70 Cal. 515, 11 Pac. 673.

[101] Johnson v. State, 14 Ga. 55 (statute); State v. Zellers, 7 N. J. L. 220.

[102] Bulliner v. People, 95 Ill. 394.

[103] Sloss-Sheffield etc. Co. v. Smith, 40 So. (Ala.) 91; Behrman v. Terry, 31 Colo. 155, 71 Pac. 1118.

[104] Goldstein, *Trial Technique* (Chicago: Callaghan and Co., 1935), p. 210.

[105] West Chicago St. R. Co. v. Kean, 104 Ill. app. 147; State v. Forbes, 111 La. 473, 35 So. 710.

[106] Vance v. State, 56 Ark. 402, 19 S. W. 1066; Atlantic and Birmingham R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482.

[107] Hinkle v. State, 94 Ga. 595, 21 S. E. 595; First Nat. Bank v. Knoll, 7 Kans. app. 352, 52 Pac. 619.

Cases and Studies

CANONICAL SEPARATION AND CIVIL ACTION *

Canon 1128—Married persons are obliged to preserve the community of conjugal life, unless a just cause excuses them from the obligation.

It is beyond question that from the very beginning Holy Church gave very close supervision to all that pertained to the great Sacrament of Matrimony. From the Holy Gospel we learn that St. John the Baptist gave his life in defence of the unity of Marriage. The Apostle of the Gentiles severely punished the guilty Corinthian for his crime against marriage, and also, proclaimed the Privilege which is called by his name Pauline. From the very first century then, delicts against the Sacrament were recognized and punished by the judicial authority of the Church.

No sooner was the Church released from the Catacombs than various synods and Councils began to issue decrees against those who presumed to violate the law demanding cohabitation and to separate on their own account. A review of the centuries from the fifth to the eleventh reveals that a judicial form was decreed by many synods in the handling of quarrels of married people. The discovery at Pisa in 1070 of the famous Justinian *Digesta* energized the study of law and led to the development of many famous Schools of Law throughout Europe. This was followed in two centuries by the *Decretum Gratiani,* which was used as a *Corpus Iuris* up to our own time. Gratian gives a case wherein a husband had dismissed his wife on the grounds that an impediment of consanguinity had invalidated their marriage. The matter having been brought to the attention of the Supreme Pontiff, Pope Alexander II made it clear that the husband was guilty of an illicit act and that the case was to be remanded for trial by the proper ecclesiastical authority.

* Paper read by the Reverend John A. Delane at the Northwestern Regional Conference Meeting of The Canon Law Society of America, held at Helena, Montana, September 15, 1953.

During the fifteenth and sixteenth centuries Christian teaching concerning the indissolubility of marriage was widely abandoned; this was tremendously increased by bad example in high stations. Leaders in Church and State openly abandoned their vows either of celibacy or of permanency of the marriage vow and took spouses. It spelled disaster to the Christian ideal and discipline of marriage which through centuries of painful and laborious preaching and example had been slowly built up, and which was now by a widespread hysteria to be thrown down and abandoned. We suffer to this day from this destructive example. No longer can we maintain that the inviolable and sacred ideal of the union of man and woman in marriage as taught by the Divine Master is observed as it was in the days before the Lutheran revolution. Divine Providence disposed that the Sacred Council of Trent arise and proclaim to the world the ancient Faith and discipline of the sacrament of Matrimony. The acta of the Council of Trent regarding our topic are brief but they furnish the framework on which later legislation was built. It is true that in certain countries in Europe, notably in Poland, a looseness of curial discipline crept in, and Pope Benedict XIV saw fit to correct these abuses in the celebrated Constitution "*Dei miseratione*" in 1741.

Father Wernz in his *Ius Decretalium* shows that both before and after the Council of Trent the solemn process was the common practice in handling all suits concerning Separation. No doubt the summary and administrative processes were used in some obvious cases, or in cases that demanded quick decision, but the formal method was considered the customary one. With the years and the growth of more and more cases we find the summary process more widely used. A reply of June 25th, 1932, by the Pontifical Commission for the Interpretation of the Code prescribed the administrative method for the cases named in canon 1131, par. 1, unless the Ordinary either at his own will, or at the will of the parties, decided that the formal process be used.

Father Cappello reasons from the words of the canon that the administrative way is now the usual one; he points out that there is no mention of a *iudex* in the canon, and that if the aggrieved party may leave *propria auctoritate* provided there is danger in delay and the cause is certain, then, *a fortiori*, the Bishop examining the case may, if he is satisfied with the evidence, summarily decree a

separation for a time, either definite or indefinite. It is to be noted, however, that a perpetual separation ordinarily demands closer examination and fuller deliberation and may need the formal process.

Accustomed as we are to the simplicity and uniformity of the canonical law in this matter, we are appalled at the witches' brew of legislation covering civil separation and divorce in the United States. Owing principally to the pagan concept of the marriage contract, collusion between the parties, the agreement to allege a cause which does not bring shame upon either of the parties, even though not true in fact, is frequently made the basis of the divorce. We must admit this disgraceful fact that the divine teaching and the natural law are more and more ignored in our present-day society, and this trend of public opinion inclines both legislators and judges to grave laxity in this matter. Our citizens show a great lack of social maturity, an ignorance of christian doctrine and a selfishness that leads to decadence of family life and an undermining of the nation itself.

What norms then are we to adopt in those cases of separation that so frequently come for decision to our Chanceries? It is clear that the Code has not detailed any special rules in the matter. The Code is universal law, and since there is great diversity of social custom and mentality in the world the Holy See has avoided specific rules. We must depend on the views of approved authors who interpret the mind of the Holy See from the replies of the Sacred Congregations in answer to problems on this point offered by Bishops from all over the world. In the former replies made to certain Bishops in England and France in 1860 and 1878 by the Sacred Congregation of the Holy Office the judicial procedure was prescribed and no relief was to be sought from the civil courts even "*ob gravissimas causas*". This because the opinion was widely held that to apply for a divorce in a civil court was an intrinsically evil act. Card. Gasparri in his book "*De Matrimonio*" (1932) threw new light on this point by quoting a reply of the Sacred Congregation of the Holy Office to the effect that for certain enumerated grave reasons the appeal to the civil court may be made: "*permitti posse*".

Fr. V. Hines in his book "*De conjugum separatione*" gives the grave reasons as follows: 1. to prevent the prodigal father from

squandering the family property; 2. to remove the children from the evil influence and vicious power and example of the father; 3. to obtain peace in the home and avoid the scandal of continual exchange of bitter words and quarrels between the spouses. Since this permission of the Holy See was conceded in the case, it follows that the petitioning and obtaining of a divorce in a civil court is not an intrinsically evil act. But this does not mean that the permission is a general permission; the Holy See was aware that grave abuse could follow in this matter. Who, then, in the mind of the Holy See is to judge the "just cause" of canon 1128 and in what manner?

It is the chief duty of the Ordinary to protect Faith and Morals in the diocese assigned to his spiritual care by the Supreme Pontiff. The Bishop is the competent authority and either in person or by delegation he adjudges the petition submitted by the pastor. This *libellus* must be prepared with great care by the pastor or an assistant under the pastor's supervision. It is the duty of the diocesan Promoter of Justice to draw up the necessary interrogatories and examine all the evidence to be submitted to the judgment of the Ordinary. The *Defensor Vinculi* is not involved in these cases, since there is no question of the bond. Cohabitation in marriage is an affair of the public good, hence it is the business of the Promoter to supervise these cases. There is no ironclad rule demanding a judicial formal decision in these cases; they are, according to the common opinion of canonists, administrative cases and may be handled informally with the strict attention and care that the Church demands in all that belongs to the Sacraments. The Bishop, then, is to judge what he considers best in the interests (especially spiritual) of the parties, with due regard for the avoidance of scandal or lest people may think such an important matter is only a form to be gone through. If the Ordinary decides that a separation ought to be given there ought to be a form in which the applicant will swear before the Bishop's delegate and two witnesses that the divorce is sought solely for the civil rights it affords and that there is no intention whatever to attempt to dissolve the bond which in a sacramental marriage is for life. Some authors add that there should be another affidavit regarding reconciliation; that cohabitation should be resumed if a reconciliation be possible. However, experience shows that a large number, by far the majority of cases,

of these marriage breakups occur in mixed marriages and that as a consequence the non-Catholic party soon remarries. This puts an end to all reconciliation.

PROCEDURE IN SEPARATION CASES *

The following paper is intended to portray a picture of the process in use in the Diocese of Youngstown for handling petitions for Separation. Our practice, which is still evolving, had its origin in and has taken its form mostly thru the influences of necessity. In much of this plan there is little evidence of the strict observance of the minutiae of the law, particularly the requirement that the *Promotor Institiae* take part in such action. What is wanting in this plan appears to be to those who work with it, the Ordinary included, the imperfection of incompleteness rather than the corruption of positive error—much of it is, if not *secundum normam*, at least *non contra legem.*

That one may make a fair comparison and perhaps evaluate the workability of this plan in his own Diocese—or even be convinced of how much better his own plan is—he may find these figures helpful.

We were founded as a Diocese in July of 1943, being cut off geographically from Cleveland. The Diocese of Youngstown, Ohio, embraces 3,500 square miles, is 100 miles long and 60 miles wide at its greatest distances, though it averages 75 by 45 miles in length and breadth. There are 110 parishes staffed by 201 secular priests. As many as 49 religious priests also labor in the Diocese, though more than half of these are engaged in undertakings peculiar to their own constitutions, not in parish work. Its six counties, each a Deanery, have a population of 1,000,000 people of whom about 20% are Catholic. The principle cities are Youngstown, Canton and Warren, with 175, 125, and 50 thousand in population, respectively. There are 4 cities of about 40 thousand and 5 of about 10 thousand in population. The other half of the population is in rural areas. The largest number of parishes are in Youngstown—

* Address delivered by the Very Reverend Robert J. O'Dea, *Vice-Officialis* of the Diocese of Youngstown, at the Annual National Meeting of The Canon Law Society of America, held November 11 and 12, 1953, at Omaha, Nebraska.

22 Latin and 5 Oriental; Canton—11 Latin and 1 Oriental; Warren —5 Latin and 1 Oriental. In the rural areas the parishes generally are about 10 miles apart.

We have practically every nationality represented—the cities of Youngstown, Warren, and Canton being steel towns; they have their full complement of the Italian, Slavish and Polish nationalities, not to mention the Irish. Of these, the Slovaks have been the least ready to abandon the incidents of their nationality and to become amalgamated with other ethnic groups.

Our Court was first activated in the fall of 1948, with one priest laboring full time. Since that time two more priests were added to assist in the many tasks of the Tribunal, handling all the formal, informal, defect of form and papal cases, sanations, separation and divorce petitions. These three full time priests have offices in the Chancery Building, though each of them has a responsibility elsewhere as a chaplain or mission attendant. One lay person is employed full time as a secretary.

In the past permission for separation and permission for civil divorce were granted by the Bishop's signature, on the presentation of a very sketchy petition. This action usually presumed that the parish priest had exerted every effort to effect reconciliation, had established the reality of the petitioner's claims and had come to the conclusion that the case was now ready for the Bishop's decision. The priest often was actually washing his hands of the matter by sending in the petition. Because human nature is an habiliment of both the spouses concerned and the priest advocate; because, too, emotionally distressed persons can unwittingly play havoc with the truth and be altogether subjective in their estimates; because the priest was busy and unfamiliar with the *praxis Curiae* (there being no *Curia* to have a *praxis*); because there always appeared to be an impelling and immediate urgency to these needs which, if left unanswered, helped swell an appalling local divorce rate and often caused repercussions from the supposedly guilty spouse, who frequently had never been contacted because it appeared useless or impossible, and who *post factum* proved himself to have been innocent, it appeared that such cases could not be handled in a purely administrative rather than a judicial way.

Much study, cautious experimentation, and a respectful estimate of our limitations prompted the adoption of the following plan by the Bishop.

1. The directive published on the Feast of St. Anne, which is in the hands of every priest in the Diocese, is a digest of the law of canons 1128-1132 of the *Code of Canon Law* with appropriate observations on their significance drawn from canonical doctrine. It is to serve the priest in his dealings with the parties, the advice he gives them and the means employed in preparing the petition if that is warranted. The directive further suggests how the priest is to use the Courts facilities when his own efforts are inadequate. (See Appendix—*Excerpts from Directive.*)

2. The employment of the new petition form is obligatory (see Appendix—*Form 80*).

3. Petition is to come whenever possible from the parish of the complainant, or at least from a priest who knows the situation or is willing to interest himself in it. People are given petition interviews at the office by way of exception only under special circumstances.

4. The presentation of the petition to the Tribunal presupposes that the priest has made every effort to reconcile the couple and has ascertained the guilt of the offending party and the guilty party's refusal or failure to mend his or her ways.

5. After investigation and proper proof the Tribunal turns its findings over to the Bishop with recommendations and asks for a declaration.

In practice a representative case might be handled, with variations dependent on circumstances, as follows. The petition (*Form 80*) and the respondent's deposition (see *Form 81*), plus testimonies of any other witnesses (see *Form 82*) on arrival at the Tribunal are read by the priest especially appointed to this work. Most often it is also read by one of the other priests in the Court and a discussion or evaluation is made, based on the general impression created. Very often the parties are then asked to present themselves separately for an interview. The effectiveness of such interviews is often unbelievable, since the parties have a certain awesome respect for and fear of "front offices." The priest in the Tribunal seldom is suspected of showing favoritism or being shallow, disinterested or too busy. Looking upon us as those people called experts, clients attach immense importance to whatever we say.

The delay caused by arranging for the appointment is frequently a very effective instrument in effecting reconciliation. Time is a great healer, at least if the party can be kept conscious that something constructive is being done whilst time is being consumed.

On the occasion of this interview, in which the party is usually allowed to unburden himself, an understanding sympathy is expressed even for the guilty party; some challenge is made to their fault, possible therapy suggested, and strong issue made of the indissolubility of marriage. Almost invariably the party or parties are neglecting the practice of their Faith, especially Confession and Communion. They are urged to get to Confession and Communion, pray for direction, arrange for a retreat, etc. On leaving they are usually presented with at least a prayer card, or pamphlet on how to be a good husband, father, wife or mother. Sometimes a copy of the Encyclical or one of the Ottawa University's Manuals is given to them with assigned reading.

At this point many avenues of approach are resorted to in order to get a better understanding both of the objective problem and of the personality, temperament and capacity of the parties involved, for it is the subjective, personalized, individual problem which must be met as it exists for the parties. These steps may be handled directly by the Tribunal or by the parish priest.

Experience has convinced us of the value of a talk with both lawyers, who most often prove to be interested in reconciliation attempts, but have not suggested such because their client never indicated any such interest, nor did the other party's legal advisor. The Catholic party is often ignorant of the obligation to have the Church establish his right to sue for divorce, or even to cross petition. Some good will has arisen from our practice of sending the lawyers information on our ecclesiastical process; on their responsibilities in acting as advocate for Catholics, etc. We have made a habit of sending them free, copies of a brochure entitled *Legal Moral Principles,* by Rev. Raymond P. Murray; publisher: Ranch & Stoeckl Printing Co., Buffalo. The publications of the Catholic Lawyer's Guild, Chicago, *Natural Law and the Legal Profession* and *Canon Law on Civil Action* are always well received. A legal directory in which we have marked off the names of the Catholic

lawyers is an invaluable aid in knowing how to approach them properly.

A social worker is very often pressed into service when one of the parties refuses to be interviewed by the parish priest or the Court, or when some specific circumstance indicates the wisdom of lay, but specially trained help. There are times when the lawyer and the social worker have an advantage over the priest, in that their clients sometimes speak more freely and realistically with them about their troubles.

In our Diocese there are Catholic Service Leagues in each of the deaneries, which are coexistensive with the Counties. In Youngstown proper a male social worker, paid by the Catholic Service League and assigned to Family Relations Social Work, has proved very valuable to us. He is a young married man, concerned with raising a family of his own, still pursuing graduate studies in the field of Social Work, possessed of a pleasant yet aggressive personality and finds his work a challenge to the advancement of his learning and faith. He has been able frequently to bring us the layman's slant and often the layman's solution. Unfortunately most of our female social workers are unmarried and because of this are somewhat hampered in the performance of truly effective work.

A search in the case histories of our Catholic Service League and in the Social Service Exchange often revealed that our clients were following a definite pattern, and that the present need was but another facet or a recurrence of a personal and familial deficiency. In certain cases the Social Agency was capable of taking over the problem and effecting a solution without further assist from the Tribunal. This was especially true where the difficulty was based on finances, work placement, home finding, medical or physical needs, which could be dispelled by some form of organized social work assistance; e.g. Red Cross, visiting nurse, aid for dependent mothers, alcoholic hospitals, out patient clinics.

During the period of continuing investigation, and where prudence so dictated, suggestion is sometimes made that the parties elect by mutual agreement to live apart for the time being so as to level off from their nervous tension, and forestall the possibility that the estrangement difficulties become acute. The environment of a happily married relative's home in which they might seek tem-

porary refuge is a powerful inspirational influence. Proper physical, psychical and spiritual medication and therapy at this time often eliminate much if not all the time consuming contacts which would otherwise be taking place. It has been found that lonesomeness, especially separation from the children and the realization of dependence, plus the consciousness of failure and the recognition of guilt or incompetence inspire the spouses to make real sacrifices in their salvage efforts.

Counselling is often arranged, most often by the parish priest, though it may also be done by the physician, psychiatrist or social worker. The priest in many instances had to do nothing more than give the Instructions called for in the prescription of the *Sacrosanctum* with regard to nupturients—the case history revealed that this had not been done. When in spite of all these efforts the attempts at restoring compatibility are fruitless, or when the guilty party remains adamant in his fault, the Bishop grants separations for a term, usually of six months, or even indefinitely, with a report arrangement made a matter of obligation. Civil action is permitted only when there is no other solution to existent problems, the spiritual estate of the complainant so demands, or where the canonical cause of adultery so permits, and reconciliation is impossible. In all such grants the *bonum commune* and the *ordo publicus* must also be considered.

Surprisingly enough, we have had many seemingly irreconcilable parties return to common life spontaneously after the Court had exhausted itself in its efforts to help. Such an effect is undoubtedly the workings of Divine Grace; the advice and suggestions of the Court take meaning and become operative by a sort of reviviscence after the parties have purged themselves of their hate. It seems they have at length discovered that the expected thrill of the idealistic future exploded with the cold touch of reality which was worlds removed from their wishful and perverted thinking. The old marriage now looks good by contrast with a lonesome freedom.

Needless to say, what we have here related is not a stereotyped pattern form, to be applied with equal success to all cases. The Court must be resourceful, infinitely patient, untiring, inspirational and prayerful. Even in cases where obviously the right to separate has been established, the marriage perdures: Indissolubility remains

even though the obligation of the common life may be lifted. But if the bond remain, should not the parties remain together? If God forgives even adultery, then certainly it would be a virtue if a spouse too could do the same. Establishing a person's right to separate does not necessitate his use of this privilege. If social workers, lawyers, doctors, priests and spouses could keep before their minds the import of indissolubility, I am sure there would be far less need for Church Courts or papers such as this.

In closing I might add that I have yet to meet an estranged (guilty) person who was interested in logic, justice or reprimand. Rather, understanding, sympathy, tolerance, forgiveness, inspiration, loving kindness are in order. A shipwrecked person is not interested in lectures on water safety; he wants a plank. Do not deal with sins, but with sinners: hate the first, but love the latter. Successful treatment of these cases must reach the will and emotions first, and then only, the intellect.

APPENDIX

Excerpts from Directive

III—ecclesiastical permission is required for civil separation or civil divorce

The very fact that a petitioner has been granted a decree of separation by ecclesiastical authority does not imply that ipso facto permission is granted to the petitioner to file suit in a civil court. The one permission is distinct from the other. Under pain of ecclesiastical sanction, in virtue of Decree n. 126, of the III Plenary Council of Baltimore, Catholics must seek permission from ecclesiastical authority to sue for civil divorce. "... iis omnibus, qui matrimonio conjuncti sunt, praecipimus, ne inconsulta auctoritate ecclesiastica, tribunalia civilia adeant ad obtinendam separationem a thoro et mensa. Quod si quis attentaverit, sciat se gravem reatum incurrere et pro Episcopi judicio puniendum esse."

In the mind of the civil courts divorce is something absolute and final. A typical decree goes somewhat in this fashion: "It is, therefore, hereby ordered, decreed, and adjudged, that the plaintiff be and is hereby granted an absolute divorce from the defendant and the bonds of matrimony heretofore existing between the parties are hereby severed and set at naught, and both parties are released from the obligations thereof ..." (State of Ohio, Mahoning County). In no way does the Catholic position recognize the power of the State to grant decrees of absolute dissolution in cases of valid marriages. The Catholic position has always interpreted the Divine and Natural Law to mean that no power on earth can sever the bond of a consummated marriage save death alone of one of the spouses.

In spite of the fact that our Catholic people are warned that civil divorce does not dissolve the marriage bond, the impression is still created in the minds of many that an absolute dissolution does take place. At the same time even though the parties may be aware of the fact that according to Divine and Natural Law the bond still perdures, nevertheless, in a certain sense they have their civil freedom. As a consequence of this there is always the danger of an attempted marriage by one or even both parties. Youthful age and the continued presence of temptation certainly make this a proximate possibility and in a great number of cases a reality.

In cases of mixed and disparate marriages dissolved by civil divorce, the danger of an attempted marriage by the non-Catholic spouse is even more proximate. In spite of the promise signed by the non-Catholic party at the time of the marriage that he will adhere to the Divine Law that prohibits all divorce, non-Catholic thinking is still such as to warrant a marriage after divorce.

The danger of an attempted marriage by the Catholic party and by the non-Catholic party, after civil divorce is granted, is ever present and cannot be overlooked. To grant permission for litigation in a civil court is a serious and grave decision for a Bishop. It can readily be seen that the Bishop who would grant civil divorce permissions without conscientious and serious consideration, would foster the opportunity for attempted marriages and become their near occasion.

It is primarily because of this danger and, in a certain sense, to avoid giving any sort of tacit approval to the attitude of our civil courts, that divorce permissions are infrequently and reluctantly granted. In many states some sort of decree of separation or divorce is necessary to insure the civil effects of separation and to safeguard the property rights of the injured party. Consequently, due consideration is given to a petitioner's request for permission to file suit in a civil divorce court but in practice the following is strictly adhered to. The Court looks for the following:

1—Ecclesiastical separation of a perpetual character:

The incongruity of a divorce in a case involving temporary separation can readily be seen. In a temporary separation the community life is suspended for a time only. Civil divorce would make the termination of cohabitation something final. At the same time where there is every hope for reconciliation in cases of temporary separation, all future attempts at reconciliation would seem next to impossible were an absolute divorce granted.

Even though perpetual separation is warranted on grounds of infidelity, in the prudent judgment of the Bishop or his delegate divorce may seem inadvisable and permission for it may be refused. This is especially true in cases involving marriages of short duration and where there is a good possibility for reconciliation even after the proof for the infidelity of one of the parties is established. It may be that the innocent party has not developed an absolute aversion and hatred towards the guilty party and the infidelity of the guilty party is perhaps a single act and due to an infatuation which may in time wear off.

2—The safeguarding of the property rights of the injured party:

It may be that the innocent party through his or her efforts and ingenuity, and sometimes sacrifice at great cost, has accumulated certain savings for future security. The innocent party would not be entitled to all these savings because of the dower right of the guilty party. It may also be that the innocent party has acquired a home or other investments but would not be entitled to absolute ownership of the home or other investments because by reason of a dower right the guilty party is co-owner. In cases of this nature, for the future security of the innocent party and the children, permission for civil divorce may be sought.

Permission for such civil litigation is granted only after an evaluation of the property rights and the assurance that this is the only way whereby the property rights of the injured party and the future security of the children can be made certain.

3—The petitioner's promise not to attempt marriage nor to "keep company" with the opposite sex:

If there is any indecision or a reasonable suspicion that the petitioner will "keep company" with the opposite sex and seeks ecclesiastical permission for divorce as a protective measure and something to boast about, permission for divorce could hardly be considered.

When the Catholic petitioner has obtained permission from proper ecclesiastical authority to enter suit for civil divorce, he (she) should be warned of the grave penalty of excommunication incurred "ipso facto" by those who attempt marriage after divorce. Decree n. 124 of the III Plenary Council of Baltimore enacts: ". . . manifeste apparet gravissimae culpae illos esse reos, qui a magistratu civili matrimonium dissolvi postulant, vel, quod gravius est, divortio civili obtento, novum matrimonium inire attentant legitimo vinculo posthabito, quod coram Deo et Ecclesia adhuc manet. Ad haec crimina compescenda poenam excommunicationis statuimus, Ordinario reservatam, ipso facto incurrendam ab eis, qui postquam divortium civile obtinuerint, matrimonium ausi fuerint attentare."

IV—OBSERVATIONS:

1—Separation permissions are not to be sought unless the priest has made every effort to reconcile the couple, and has ascertained the guilt of the offending party and the guilty party's refusal or failure to mend his or her ways.

2—Action for civil divorce is to be discouraged as much as possible, and permission for civil divorce is to be sought only in accord with this instruction. The parish priest on his own private authority is not empowered to grant such permission, nor should he suggest it.

3—A study of the case entails also the answer of the respondent to the allegations of the petitioner and the testimony of witneses. It may happen that after an investigation the Church Court will recommend further reconciliation attempts, especially if the parties to the marraige are of a youthful age, immature, and have not properly adjusted themselves to marital cohabitation.

For thorough reconciliation attempts the following suggestions may prove helpful:

Instructions and counseling on the duties and obligations of married people: Oftentimes it comes to light that the parties prior to the marriage had not sufficient instruction on their duties, obligations and rights. In all such instances thorough counselling and a series of instructions will prove useful if not obligatory.

At this point it is well to remind the Reverend Pastors and their Reverend Assistants of the required pre-matrimonial instructions demanded by Canon 1033 and even more specifically by the Instruction of the Sacred Congregation of the Sacraments, June 29, 1941: "The pastor must further inquire, unless the quality of the persons renders this question unnecessary, whether they are sufficiently instructed in Christian Doctrine, and especially whether they thoroughly realize the sanctity and indissolubility of Christian marriage and the obligations of the conjugal state. If he finds them ignorant of Christian Doctrine, he must carefully instruct them at least in its first elements; . . ."

In an effort towards reconciliation sound counselling may reorientate the couple in their spiritual outlook on marriage and may move them to start anew their marital life.

If the couple has neglected the frequent reception of the Sacraments, the priest ought to instruct them on the importance of even a weekly reception of these two means of grace, asking the couple at the same time to report to him weekly, if possible, on their progress towards harmonious cohabitation.

Conferences with the families of the parties: If there is any real family interference and the priest has ascertained that such family interference is a source of the marital strife, he ought, and in certain cases would be obliged, to talk to those members of the family who are a source of contention.

The employment of doctors, social workers, Alcoholics Anonymous members: The Tribunal has found the employment of doctors, psychiatrists, Alcoholics Anonymous members, and social workers invaluable in the task of reconciling couples. If the priest feels the need of medical attention for one or the other spouse he should suggest consultation with the family doctor or some other reliable doctor whom the couple would be willing to visit. In cases where habitual drinking is the problem, the suggestion of an Alcoholics Anonymous program, or an insistence on the use of the program, may prove to be the very thing that will effect reconciliation.

The Tribunal has found also the help of our various Service Leagues and their social workers to be instrumental in bringing about reconciliations. In no way does the social worker encroach upon the field of the parish priest. The social worker's strategy is rather a psychological one. Many times the so-called guilty party will not talk to the priest but will be found willing to discuss the problem with a lay person. Strange, also, as it may seem, the petitioner and the respondent in some cases are more willing to confide in a lay person than in the priest. This may be due at times to family friendship with the priest or fear of embarrassment before one held in great reverence.

Trained in the field of social work, our Catholic social workers are prepared

to make the necessary home calls, to study home conditions, a correction of which may be just the thing to alleviate the problem. The early employment of the social worker in any case may prove helpful later on if the case finally comes up before a civil judge and the welfare of the children would be jeopardized.

Diary on reconciliation attempts: It is also recommended that the priest keep a running diary or at least some sort of memoranda on all contacts with the parties from the very first contact. It would be well to note in this diary what the actual problem was at the very outset and the nature of the counselling given at that time. Notes on all reconciliation talks with the parties, whether singly or together, on the receptivity and cooperation of the parties ought to be made. Memoranda on contacts with other people involved in the case, i.e., parents of parties, witnesses, doctors, lawyers, etc., will help in the making of a fairer evaluation of the case. A report of this kind sent with the petition will certainly enable the Tribunal to make a truer estimate of the worthiness of the petitioner and the case.

Visum et approbatum
die 26a, mensis Julii
anno 1952
Festo Stae Annae, Matris B. Mariae V.

†Emmet M. Walsh
Coadjutor Bishop of Youngstown

Joseph A. Galganski
Notary

Form 80

Prot. Num. .....

PETITION FOR SEPARATION AS TO BED, BOARD AND DWELLING PLACE

.....

vs.

.....

The Law: Canons 1128-1132 C. I. C. III Plen. Counc. Baltimore Decrees n. 124, n. 126.

(N.B. This petition to be used only when all efforts at reconciliation have failed and priest-advocate is certain of the guilt of the respondent and of the respondent's obstinacy and refusal to mend his or her ways.)

Your Excellency:

I, ..., a baptized Catholic, having contracted marriage with ..... (also a baptized Catholic) (a non-Catholic), on ....., 19...., at .....
(Month) (Date) (Name of Church)
....., ...
(City) (State)

hereby request permission for:

....PERPETUAL SEPARATION as to bed, board and dwelling-place from my consort—on grounds of adultery in accordance with the rulings of canons 1129-1130 (see q. 71 a) b) c) d).

....TEMPORARY SEPARATION as to bed, board and dwelling-place from my consort in accordance with the rulings of canons 1131-1132, specifically because:

....My consort, who once was a Catholic, has affiliated with a non-Catholic sect.
....My consort has educated our children in a non-Catholic sect and still insists on their education in a non-Catholic sect.
....My sonsort is habitually leading a criminal and disgraceful life.
....My consort is the cause of serious danger to my soul and/or body.
....My consort is unbearably cruel, making conjugal life insupportable.
....My consort, because of reasons similar to the foregoing, makes conjugal life unbearable (reasons to be enumerated and explained in priest's summary).

In proof of my claim I submit the following documents:
....Record of Catholic Baptism.
....Record of Marriage from Register of the Church.

Obediently yours,

Date .....
Priest .....

.....
Petitioner

STATEMENT OF PETITIONER

Priest-Advocate will explain the sacredness of an oath and its gravity and will give warning about the serious consequences of perjury.

Oath before testimony:

I, ..., realizing the sacred character of an oath and the importance to tell the truth, solemnly swear that in answer to your questions I shall tell the truth and nothing but the truth, as far as I know it before God and my conscience, without exaggerating, adding, omitting, or changing anything. So help me God and these His Holy Gospels which I touch with my hand.

THE PETITIONER OFFERS THE FOLLOWING PERSONAL DATA REGARDING HIMSELF/HERSELF:

1. What is your full name (maiden name if woman):
2. What is your present address: Tel.
3. Kindly give the names of your father and mother and their addresses:
4. What is the religion of a) your father; b) your mother:
5. When and where were you born?
6. When and where were you baptized?
7. Did you attend parochial school? Name and place of school:
8. Did you attend a Catholic high-school? Name and place of school:
9. If you did not attend Catholic schools, where and for how long did you receive Catholic instructions?
10. Have you always been a practical Catholic?

a) Before marriage how often did you receive the Sacraments of Penance and Holy Communion?
b) During your married life how often did you receive the Sacraments of Penance and Holy Communion?
c) When was the last time that you received these Sacraments?
d) If you have not been regular in the reception of these Sacraments, please explain the reasons for your neglect:

THE PETITIONER OFFERS THE FOLLOWING PERSONAL DATA REGARDING THE RESPONDENT:

11. What is your consort's full name? (maiden name if woman)
12. What is your consort's present address?
(If address is unknown, where and how can your consort be reached—through what friends, places of business, etc.)
13. Kindly give the names of your consort's father and mother and their addresses:
14. What is the religion of a) your consort's father; b) your consort's mother:
15. When and where was your consort born?
16. What is the religion of your consort?
17. If your consort is a Catholic, please answer the following:

a) When and where was your consort baptized?
b) Did your consort attend parochial school? Name and place of school:
c) Did your consort attend a Catholic high-school? Name and place of school:
d) If your consort did not attend Catholic schools, where and for how long did your consort receive Catholic instructions?
e) Has your consort always been a practical Catholic?
f) Before marriage how often did your consort receive the Sacraments of Penance and Holy Communion?
g) During the mariage how often did your consort receive the Sacraments of Penance and Holy Communion?
h) When was the last time that your consort received the Sacraments?
i) If your consort has not been regular in the reception of these Sacraments, can you offer any explanation?
j) If your consort was in any way lax in the practice of his religion before marriage, were you aware of this laxity?

THE PETITIONER OFFERS THE FOLLOWING PERSONAL DATA REGARDING THE MARRIAGE:

18. How long was your courtship before the marriage?
19. Were there any disagreements before marriage? If yes, how often?
20. Over what were these disagreements? (Please explain.)
21. How was the friendly relationship re-established?

22. Was there any indication of alcoholism in your consort before marriage? (Please explain the extent of your consort's drinking habits before marriage.)
23. Was there any indication of bad outbursts of temper by your consort before marriage? (Please explain reason for these outbursts of temper.)
24. Were there indications of any other instability on the part of your consort? (Please explain at length.)
25. Was the engagement ever broken? If yes, please explain why.
26. If your engagement was broken, how was the friendly relationship reestablished?
27. Was your consort married before contracting marriage with you?
28. If your consort was married before contracting marriage with you, please answer the following:

    a) Was your consort's former spouse dead?
    b) Was a decree of nullity sought for your consort's former marriage?
    c) Before marriage did you know of your consort's former marriage?
    d) If there was a former attempted marriage on the part of your consort, did you know why the former marriage was not validated?
    e) What were the grounds for civil divorce for your consort's former attempted marriage?

29. Did you attempt marriage before a civil magistrate or minister before the ecclesiastical marriage with your consort?
    If yes, please answer the following:

    a) Please give reason for the attempted marriage.
    b) If there was an attempted marriage, how soon after was the attempted marriage validated?

30. If there was no attempted marriage, was any dispensation granted from banns or any impediment? (Nature of impediment.)
31. If dispensation was sought from banns, why was this done?
32. If marriage was hurried in any way, please explain the reason.
33. Did you have a course of pre-marital instructions before marriage?

    a) How many instructions were given?
    b) Who gave the instructions?
    c) What was the nature of these instructions?
    d) As a Catholic did you fully realize that you were contracting marriage for better and worse?
    e) Did you realize that you were contracting and entering a permanent union?
    f) Did you realize that marriage is for the procreation of children?

34. Did your parents approve of your marriage to the consort from whom you now wish to be separated?
35. If they disapproved, please explain the reason for their disapproval:
36. Did your consort's parents approve of the marriage?
37. If they disapproved, please explain reason for their disapproval:

38. How many children were born of your marriage? Give names and ages:
39. If no children were born, was it because unnatural family limitation was practiced?
40. If yes, please answer the following:
    a) Was it at your insistence?
    b) Your consort's insistence?
    c) Did you disapprove of the practice?
    d) Because both you and your consort agreed to the practice?
41. Even if you had a family, was unnatural family limitation practiced in any way?
42. If yes, please answer the following:
    a) Was it at your insistence?
    b) Your consort's insistence?
    c) Did you disapprove of the practice?
    d) Did your consort disapprove of the practice?
    e) Because both you and your consort agreed to the practice?
43. Were all the children baptized in the Catholic Faith? If not, why not?
44. Were they sent to a Catholic school? If not, why not?
45. Have they received any religious instructions? If yes, where and for how long?
46. Has your consort in any way objected to their Catholic education? Please explain at length:
47. Have they made their First Holy Communion? If there was any objection by your consort to their Catholic education, how was this finally accomplished?
48. Did your consort treat and care for the children and family as a true parent? If not, please explain fully the extent of your consort's neglect. If non-support is alleged, priest-auditor will ascertain its extent (memo on earnings, expenses, etc.)
49. How long did you live as huband and wife before any difficulty arose?
50. What was the cause of your first difficulty? (Please explain at length:)
51. Was there any separation after the first difficulty?
52. Did you go back together after this first separation? If yes, what made you resume marital life?
53. Was there any repetition of the first difficulty? Please explain the frequency and duration of trouble:
54. When did the first separation actually take place?
55. Did you resume married life after this separation? If yes, what brought you and your consort back together again?
56. How long did you stay reunited?
57. Were there any subsequent separations? Please explain how many, length and reason for them:
58. When did the last separation take place?
59. What was the real cause of this separation? (Please explain at length.)

a) Did you leave?
b) Did you ask your consort to leave? If yes, why?
c) Did your consort leave of his (or her) own accord? If yes, why?

60. During your marriage was there any interference on part of your parents? (Please explain.)
61. During your marriage was there any interference on part of your consort's parents? Please explain.
62. Have you sought advice from anyone other than your parish priest regarding your marital difficulty (e.g., doctor, social worker, friends, relatives, etc.)?
63. What was recommended and by whom?
64. Do your parents at present approve of the separation? (Please explain their reason for their approval or disapproval.)
65. Do your consort's parents at present approve of the separation? (Please explain their reason for their approval or disapproval.)

IF THE PETITIONER IS A WOMAN THE FOLLOWING QUESTIONS ARE TO BE ANSWERED (66-70):

66. Were you employed during the duration of your marriage? (Explain if from the beginning or later during marriage.)
67. Where were you employed?
68. Was it absolutely necessary for you to be employed? (Explain why it was absolutely necessary for you to be employed.)
69. Did your consort object in any way to your being employed? If yes, why?
70. Did your employment in any way interfere with your home and family life? If not, please explain how your employment did not interfere with your home life and family life:
71. If infidelity is alleged by petitioner, priest-auditor will prudently and cautiously ascertain the following:

a) Was petitioner in any way responsible for the infidelity (whether or not petitioner refused to live as husband and wife; how often were the refusals; did petitioner insist on family limitation; was there any repugnance on part of petitioner to the marriage act, etc.)
b) What proof does the petitioner offer for the respondent's infidelity?
c) Was the infidelity in any way condoned by the petitioner (after knowledge of the infidelity, how soon after did the petitioner resume marital life with the respondent)?
d) Was the petitioner ever guilty of the same crime?

72. When did you see your consort the last time?
73. Was the meeting planned by your consort with the purpose of reconciliation? What was the result?
74. Is reconciliation possible at this time? If not, why not?
75. Did you ever speak to a priest about your difficulties? If so, to whom, where, when?

76. How many reconciliations did the priest attempt?
77. What was the result?
78. Did the priest talk to the two of you together? What was the result?
79. Were you in any way unwilling to be reconciled? Why?
80. Have you obtained a civil divorce from your consort? If yes, where, when and at whose advice?
81. Kindly give names and addresses of at least two witnesses, preferably Catholics, who have witnessed the mistreatment by you consort.
State relationship:
82. Do you realize that if a separation is granted such separation permission suspends only the obligation of common life and that the other obligations remain?
83. Do you realize that the separation for which you ask would not allow you to contract another marriage as long as your consort lives?
84. Do you realize that if a separation of a temporary nature is granted to you, as soon as the cause of the separation ceases to exist, you will be expected to return to your consort?
85. Is it under these conditions that you now apply for a separation?
86. Do you promise that you will not under any circumstances attempt another marriage during the natural life of your consort?
87. Do you promise that you will not keep company with the opposite sex or allow yourself to enter any occasion which might lead to a future attempted marriage?
88. Have you anything further to add that would help in determining whether or not there is a just cause for the separation?
Priest-advocate will read answers to the petitioner:
89. Do you have anything to add, change, or explain in your statement as read to you?

OATH:

I, ..., solemnly swear that in answer to the above questions, I have told the truth and nothing but the truth as far as I know it before God and my conscience; that I have neither exaggerated, nor colored the truth in my favor; that I have neither omitted any of the facts nor changed their circumstances in my favor. So help me God and these His Holy Gospels which I touch with my hand.

....
Signature of Priest-Advocate Signature of Petitioner

Date .....

Place .....

(SEAL)

ADDITIONAL INFORMATION TO BE GIVEN BY PRIEST-ADVOCATE

This information is to contain data on all reconciliation attempts; character estimates of both parties; memoranda on all conferences with parties;

financial statement of possible earnings of guilty party; extent of non-support; proofs for infidelity if allegation is made and ascertained (not mere suspicions); possibility of scandal; danger of attempted marriage, etc.

SUPPLEMENTARY PETITION FOR DIVORCE PERMISSION
(III PLEN. COUNC. BALTIMORE nn. 124, 126)

Note for Priest-Advocate:

Priest-Advocate will remind the petitioner that the oath to speak the truth still binds the petitioner; that permission for divorce is distinct from permission to separate; that permission for civil divorce action is left to the discretion and prudent judgment of the Bishop; that even though grounds for permanent separation may be established, divorce permission may not be advisable.

STATEMENT OF PETITIONER:

1. What is the real reason why you seek a divorce in the civil courts?
2. If property rights are involved, petitioner will answer the following:
   a) What is the nature of the property accumulated during the duration of your marriage?
   b) What is the approximate value of the property accumulated during your marriage?
   Other sources:
   c) How much of the property was acquired through your own efforts?
   d) How much of the property was acquired through the efforts of your consort?
3. How much scandal will be given in the neighborhood if a divorce permission is granted?
4. Has your consort asked you to obtain the divorce? What precisely was said?
5. Is there any danger that your consort will attempt marriage if a divorce is granted?
6. Is it fairly certain that you, the Catholic petitioner, will obtain custody of the children?
7. Do you promise to rear them as Catholics?
8. Do you realize that civil divorce is not a dissolution of the marriage bond?
9. Do you realize that if you attempt marriage after civil divorce, such action carries with it the automatic sentence of excommunication and infamy? (Priest will here explain meaning of excommunication and infamy.)
10. If the Bishop refuses to grant divorce permission, do you promise to abide by his decision?
11. Is there anything else you would care to add to make clear your case?

OATH:

I, ..., affirm and swear that in the above answers I have stated the truth and nothing but the truth. So help me God and these His Holy Gospels which I touch with my hand. It is on the basis of the above information which I have truthfully given that I request His Excellency to consider my request for permission to sue for civil divorce.

....
Priest-Advocate Petitioner

Date .....

Place.....

(SEAL)

FORM 81—INTERROGATORY OF RESPONDENT

SEP.
Num. Prot. .....

..... VS. .....

Questions to be proposed to:

.....
.....
.....

"I solemnly swear that in answer to your questions I shall tell the truth, the whole truth and nothing but the truth. So help me God and these His Holy Gospels which I touch with my hand."

1. What is your name (maiden name if woman)?
2. What is your present address?
3. What is your occupation?
4. Kindly give names and addresses of your father and mother?
5. What is your father's religion?
6. What is your mother's religion?
7. When and where were you born?
8. What religion do you practice?
9. When and where were you baptized?
10. Did you make your First Holy Communion? When and where?
11. Were you confirmed? When and where?
12. Are you regular in attending Mass on Sundays and Holy Days?
13. How often do you receive the Sacraments of Penance and Holy Communion?
14. When was the last time you received these Sacraments?
15. When and where did you marry .....?
16. Before whom did this marriage take place?
17. Did a civil marriage precede your marriage before the priest?
18. Why were you married the first time contrary to the laws of the Church?
19. Were you married to anyone else before you married .....?

20. Was this marriage annulled before you married .....?
21. Did ..... know of this previous marriage before marrying you?
22. How long was the courtship?
23. What religion did your spouse profess at the time of the marriage?
24. Was your spouse regular in attending Mass on Sundays and Holy Days?
25. How often did your spouse receive the Sacraments of Penance and Holy Communion?
26. When was the last time your spouse received these Sacraments?
27. How long did you and your spouse live together as husband and wife before any difficulties arose?
28. What was the cause of your first difficulty (explain at length)?
29. When did the first separation take place?
30. What brought you together again?
31. How long did you remain together?
32. When did the second separation take place?
33. What was the cause of this separation?
34. Were there any other separations and reunions?
35. When did the final separation take place?
36. What was the cause of this separation?
37. How long have you now been separated from your spouse?
38. How many children were born of your marriage?
39. Give their names and ages:
40. Did you always treat and care for the children and the family as a true parent? (Explain.)
41. Did you see to the Catholic education of your children?
42. Were they sent to a Catholic school?
43. Your spouse alleges that: (Allegations are here set forth.)
    Do you deny this or affirm it?
44. If you deny your spouse's allegations, what do you yourself say is the source of the marital difficulties?
45. If you affirm your spouse's allegations as true, and realizing at the same time that your own spiritual and temporal happiness as well as the spiritual and temporal happiness of your spouse and children depends upon your amendment, are you willing to be put on probation for three or six months, meanwhile making a regular report to your pastor on your conduct?
46. Have you discussed your difficulties with any priest?
47. With whom and how often?
48. Did you make a sincere effort to correct your ways after discussing the matter with the priest?
49. What did you do to effect the reconciliation?
50. Has any priest interviewed you together?
51. Who was the priest? When?
52. What was the result?
53. Kindly give names and addresses of at least two witnesses, preferably Catholics, who could substantiate your statements?

54. Do you realize that a separation is a very serious thing and even if granted, neither you nor your spouse could contract another marriage?
55. Do you realize that although a separation may be granted, it is of a temporary nature and that you are bound in conscience to mend your ways and become reconciled with your spouse?
56. Do you now solemnly promise to guarantee such amendment and to do everything in your power to become reconciled?
57. Have you anything further to add that would help to determine the solution of your marital difficulties?
58. (Deposition having been read) Do you wish to add or change or correct any of the foregoing statements?

"I solemnly swear before God that in the foregoing testimony as reread to me, I have told the truth and nothing but the truth. So help me God and these His Holy Gospels which I touch with my hand."

.....
Respondent

Subscribed and sworn this ..... day of ..... 19....

Place .....

(SEAL)

.....
Priest-Notary

FORM 82—INTERROGATORY OF WITNESS

SEP.

Case No. .....

..... vs. .....

Interrogatory for .....

.....

"I solemnly swear to tell the truth, the whole truth and nothing but the truth in answer to your questions. So help me God and these His Holy Gospels which I touch with my hand."

1. What is your full name (maiden name if woman)?
2. Where do you live?
3. What is your occupation?
4. What religion do you profess?
5. Are you faithful in the practice of your religion?
6. Have you any means of identification?
7. How long have you known .....?
8. Did you know him/her before his/her marriage to .....?
9. Are you related to him/her? If so what is the relationship?
10. Do you consider him/her a person who would tell the truth in all things?
11. Did you know ..... after his/her marriage?
12. Are you acquainted with his wife/her husband?

13. What is your estimate of his/her character?
14. Do you believe him/her to have been a true and faithful husband/wife?
15. If not, why not (explain):
16. What was the original cause of the separation of ..... from his wife/her husband?
17. Has this cause been repeated again and again?
18. According to your information how often has this original cause been repeated?
19. Was the original cause of separation one of infidelity or lack of support (if either, state which was the cause)?
20. In your estimation do you think the petitioner ..... may be at fault, at least to some extent?
21. In your estimation do you think the petitioner ..... is entitled to be separated from her husband/his wife (state your reasons in full)?
22. Have you specific proof of the charges you allege as the cause of the separation of ..... from her husband/his wife?
23. If so can such proofs be substantiated? How?
24. Were any children born of this union?
25. Who has custody of these children?
26. How old are the children?
27. Are the children being educated in the Catholic Faith?
28. According to your knowledge, is there any possibility of reconciliation between the parties at the present time?
29. If not, give your reasons:
30. Do you think that the petitioner ....., would attempt a civil marriage after this separation is permitted?
31. Do you think that the granting of the separation would influence the respondent ..... to attempt a civil marriage?
32. Can you give any further information which would help in determining whether or not there is just cause for the separation?
    Answers to be reread to the deponent at this point.
33. Do you have anything to add, change or delete in the foregoing testimony?

"I solemnly swear that in the foregoing testimony as reread to me, I have told the truth and nothing but the truth, so help me God and these His Holy Gospels which I touch with my hand."

.....
Witness

Subscribed and sworn this ..... day of ..... 195..

Place .....

(SEAL)

.....
Priest-Notary

THE MARRIAGE OF MINORS *

I. General Considerations

The purpose of this paper is to present a canonical commentary on the Church's legislation concerning the marriage of minors. The general law of the Church on this subject has always been marked by a twofold characteristic, namely that of protecting the liberty of the child in contracting marriage and that of moderating this freedom in order to prevent the minor from entering a hasty, ill-considered union. Never has the Church in Her universal law strayed from this middle course, either by conceding full liberty of action to the minor or by nullifying his freedom in completely subjecting him to the will of another. Here it might be noted that we are not concerned with the diriment impediment of nonage but only with that period which may be termed the " age of minority in marriage ". This period begins after the child attains marriageable age and it ceases when he reaches his majority.

Canon Law classifies persons according to age in two main groups: majors and minors. A person who has completed his 21st year is a major; under 21 years of age he is a minor. A minor may be considered either as *pubes* or *impubes*. A minor boy is presumed to have attained to puberty when he completes his 14th year; a girl, however, after her 12th year. Below these years of 14 and 12, a minor is considered *impubes;* and a person below the age of 7 is given the special name of infant, and is presumed to lack the use of reason (can. 88). So much for classification according to groups.

Through the Sacrament of Baptism man becomes a subject of rights in the Church of Christ. However, the actual capacity to acquire rights and the capability to exercise those rights once they are attained depend on various circumstances marked out and determined by the will of the legislator; thus some possess more rights than others and enjoy greater liberty in the exercise of their rights. One of the determining factors, and it may be said to be the most important, regulating the acquisition and exercise of rights, is that of age. That age should play such an important role in determining

* Paper read by the Very Reverend John Kelley, S.T.B., Chancellor, Diocese of Pueblo, at the Southwestern Regional Conference Meeting of The Canon Law Society of America, held in Santa Fe, New Mexico, September 29 and 30, 1953.

the actual juridical status of persons is not surprising. For it is an undeniable fact that the development and evolution of the mind is generally dependent in great part on the physical development of the body which comes only with the passing of years. As a basis for the acquisition of rights a human act is very often required. Consequently the person must have the use of reason. Again the importance of the right and its consequences both to the individual and to society may move the legislator to concede it only to those who have attained a certain age. The reason is that, when the person reaches that age, it may be presumed that he will be mature in mind and will, and be thus fit to possess that right. Thus, for example, the right to vote in ecclesiastical elections is given only to those who have reached the age of puberty and the right to *marry is not granted before a certain age is completed, namely the 16th year for the boy and the 14th year for the girl.* The right to receive the order of Priesthood is conceded only to those candidates who have finished their 24th year of age; and eligibility for the office of Bishop is restricted to those who are at least 30 years old.

According to the law of the Church an adult enjoys the full exercise of his rights and may dispose of them as he wills, providing he observes the order of nature and the rights of others. The lawgiver considers majors as able to take care of themselves, in other words. Minors, on the other hand, in the exercise of their rights remain dependent upon the authority of their parents or guardians, except in those matters in which the law exempts them. The purpose of the legislator in so restricting minors in the use of their rights is not to punish them but to help them. The restriction serves to prevent minors from injuring themselves by their own acts and to protect them against the schemes of unscrupulous people who would defraud them. Canon 89 states that a minor in the use of his rights is subject to the authority of his parents or guardians unless the law exempts him from the paternal power. The presumption in this canon favors the subjection of minors to their parents; hence any exception removing them from parental authority must be clearly proved. Any doubts arising on this score must be solved in favor of the authority of the parents and may not be resolved for liberty of action on the part of the child. In the interpretation of this canon the more common opinion is that the natural and divine law are not included, for this canon considers only a canonical limita-

tion which is no concern of the divine law, since the divine law belongs to a higher order of law and transcends these positive prescriptions. Thus for example, the right of a child who has the use of reason, to enter the true religion, irrespective of the wishes of his parents is not an exception to this Canon 89, for this right flows directly from the divine law.

II. The Exercise of the Right by a Minor to Marry

After having examined in a general way the exercise of rights by minors, we now come to the exercise by a minor of his right to marry. The general principle of law, namely that all persons may contract marriage who are not expressly prohibited by law, was declared by Pope Innocent III in the year 1198. The *Code of Canon Law* repeats this same provision in canon 1035. Hence it follows from this principle that a minor child may validly marry because he is not forbidden to do so by either divine or ecclesiastical law. However since marriage is a contract and the basis for society, the Church regulates it with a view to the common good. Thus in relation to the marriage of children she limits the exercise of their natural right to marry until they attain a certain age—namely, 16 for males and 14 for females. Furthermore the Church in Her Code of Law urges the natural duty incumbent upon children to inform their parents and seek their advice before contracting marriage. However, as soon as a minor child attains the age required for marriage he may validly marry without the knowledge or consent of his parents. Parental knowledge or permission are not requisite for a valid marriage. This was the teaching of the Council of Trent and this same doctrine is confirmed by the present *Code of Canon Law*. If parental knowledge and consent were necessary for the validity of a minor's marriage, this requisite would necessarily be due to a prescription of the divine law or the ecclesiastical law. But neither divine nor canon law enact that marriages contracted by minors unknown to their parents or against their will are invalid. The fundamental reason why the lack of parental knowledge or consent is not a diriment impediment to marriage lies in the fact that every person is *sui juris* in regard to choosing his state of life and does not depend on the will of another. Pope Leo XIII wrote: " in choosing a state of life, it is indisputable that all are at full liberty

either to follow the counsel of Jesus Christ as to virginity, or to enter into the bonds of marriage". (*Rerum Novarum.*)

Though parental knowledge or consent is not required for the validity of the marriage, nevertheless children have certain duties toward their parents even in this matter of contracting marriage. They owe their parents love and reverence and these virtues impose upon them the obligation of not proceeding in such a grave matter as marriage without informing their parents and seeking their advice. If children spurn this obligation without cause they are guilty of a grave sin of disrespect towards their parents. Pope Pius XI in his encyclical on Christian Marriage writes: "Lastly, let children not omit to ask the prudent advice of their parents with regard to the partner, and let them regard this advice in no light manner, in order that by their mature knowledge and experience of human affairs, they may guard against a disastrous choice and, on the threshold of matrimony, may receive more abundantly the divine blessing of the Fourth Commandment: 'Honor thy father and thy mother'—such is the first commandment with a promise—that it may be well with thee and thou mayest be long-lived upon the earth."

III. The Pastor: Marriage of Minors

And now we shall consider the procedure of the pastor in the marriage of minors. The duties of the pastor will vary according to three different possibilities and so a three-fold division logically suggests itself:

1) When the parents know of the marriage and give their consent.
2) When the parents are not informed of their child's plans to marry.
3) When the parents know of the marriage, but refuse to give their consent.

In the first case, when the parents know of the marriage and give their consent, there is no special difficulty for the pastor; he will proceed much the same as he would in any other marriage. Some points, however, even in this case deserve special attention. First, the pastor must be careful to establish proof concerning the exact age of the parties; for if one of them is below the canonical age even by a single day, the marriage would be invalid. Hence the

necessity of the Baptismal records of the parties. The year of age, as already remarked, must be complete, 16th for the boy and 14th for the girl, computed in accord with Canon 34, § 3, 3°. Hence the day of birth is not counted because the birth does not necessarily coincide with the beginning of the day; the last day in the computation of the necessary age must be completed in its entirety. Thus for example, a boy born Jan. 2, 1929 could not validly marry without a dispensation until Jan. 3, 1945. Even though the marriage of a boy after his 16th year and of a girl after completion of her 14th year is valid, nevertheless the Church discourages such early unions. In canon 1067 § 2 the legislator urges pastors of souls to dissuade young people from marrying before they have reached the age at which marriage is usually contracted according to the prevailing custom.

This is a wise prescript and the pastor should observe it faithfully. He should convincingly point out to the parties the social disadvantages of contracting marriage before the age accepted as suitable by the community wherein they reside. Moreover, such persons are immature physically, mentally and morally for marriage, and thus are apt to enter unwise unions. To marry at too early an age is harmful to both the contracting parties and their future children alike, for the spouses have not yet the necessary stability of purpose for rearing a family and very often the youthful husband is in no wise financially able to support a family. Therefore even though the parents have already given their consent to the marriage, the pastor should nevertheless discourage the children from executing their plans for marriage. Moreover he should confer with the parents and explain to them the mind of the Church in this matter and urge them to exhort their children to defer their marriage to a more suitable age. If it should happen that the parties have a grave reason for contracting marriage before the customary age, the pastor would be doing wrong in refusing to assist at their marriage. Thus if marriage provides the only practical means of freeing the parties from a habit of sin, or if the girl is already pregnant or if the marriage does not take place scandal will result then in these and similar circumstances the pastor should assist at the marriage. Secondly when the nuptrients who are of minor age, allege that their parents know of and consent to the forthcoming marriage, the pastor must be morally certain that the

parties are speaking the truth. Sometimes it has been known that the parties deliberately deceive the pastor in their impassioned desire to marry. Innumerable difficulties arise if a pastor is careless in this wise. The Sacred Congregation of the Sacraments orders the pastors to consult the parents of a minor spouse, if he is uncertain as to whether they know of and consent to the marriage. This Congregation has prepared a special questionnaire which is to be used by the pastor in making this inquiry. The parents are asked to sign this form also. And thirdly, the pastor must establish beyond doubt the absolute freedom of the parties to wed; this of course binds the pastor in regard to all marriages. Fourthly, the pastor must see to it that minors are properly instructed according to Canon 1033 concerning the sanctity and obligations of marriage. There are two considerations in the observance of this law: (1) the youthful age of the parties offers a presumption that they are more in need of such direction than others, and (2) the pastor must be careful not to shock or scandalize these young people by the manner in which he imparts this instruction. He should prudently and tactfully instruct them that marriage is a permanent union of a man and a woman for the procreation and education of children and explain to them the mutual obligations of husband and wife. Possession of this knowledge of what constitutes the essential object of the marriage contract is all important, for without it a valid marriage is impossible. Finally the pastor must observe the law concerning the publication of the Banns for minors.

In the second case, when the parents are uninformed of their children's plans to marry, and the pastor learns that minors have not consulted their parents, he should inquire of them their reason for so acting, i.e., wishing to marry without parental knowledge. For the procedure of the pastor will be determined by the causes or reasons which the parties allege. If the reasons the parties allege are not just, he must warn them of their grave obligation to inform their parents. If they refuse to do so, he must tell them he cannot assist at their marriage. Rarely will the pastor have a case where the parties have a valid reason for marrying without previously consulting their parents. As said above if the parties have no just reason for marrying without parental consent it is not necessary for the pastor to consult the Ordinary, but can simply refuse to assist at the marriage. If they still insist upon being married and

still refuse to consult their parents, it becomes the pastor's duty to inform the parents of the children's intention to marry. He should do this even over the objection of the parties concerned.

It may happen that the parties have a grave and serious reason for marrying without their parents knowledge or consent, e.g. pregnancy, unreasonable attitude on part of parents. Then the pastor must consult the Ordinary and await his decision; for the pastor is expressly forbidden by Canon 1034 to assist at the marriage of minors whose parents know nothing about their intended marriage. This obligation likewise remains even though the parents of one of the parties know of the marriage and the parents of the other party do not. Canon 1034 does not require that both of the contracting parties be of minor age; the prescript of this Canon holds as well for a marriage between a person of minor age and one who has attained his majority. However, in such a case if the parents of the minor know of and consent to the marriage, the pastor does not have to consult the Ordinary as the law of Canon 1034 does not obligate those persons who have attained their majority.

What if the parents of the minor party cannot be reached and the child wishes to marry? First try to defer the marriage until the parents can be reached if this can be done. If however, the parents cannot be contacted and it is foreseen that this condition will continue the pastor may assist at the marriage, if he is sure the persons are free to marry. In these cases though the pastor must refer the case to the Local Ordinary.

In the third case, what must the pastor do if the parents have been informed of the marriage of minors, but refuse to give their consent? The first thing the pastor must do is establish the reason for this refusal of consent on the part of the parents, for the procedure of the pastor will differ according to the reasonableness or unreasonableness of the parental refusal. He must inquire diligently just why the parents refuse consent and must not rest content with the mere testimony of the parties themselves since often they exaggerate the injustice of the parent's refusal and magnify the importance of their own reasons for marrying. In order to pass judgment the pastor must hear both sides. For this he must also consult the parents and find out from them the reason why they oppose the marriage. Here again the pastor is obligated to use the

form prescribed by the S. Cong. of the Sacraments in 1941. For if the parents are reasonable in their objection, he must present this form to the Ordinary together with his own remarks on the case. How is the pastor to determine the reasonableness or unreasonableness of the parents' refusal to consent to the marriage? What norms should he use in aiding him to formulate an equitable judgment? Here we might remark that it is not sufficient for the pastor merely to decide that the parents have just and grave reasons for opposing the marriage. But these reasons which the parents allege must be considered in relation to those which the child has for wishing to marry. Hence the causes of parental opposition must be just and grave not only objectively, but also relative to the marriage in question. The reasons of the child must also be kept in mind. Therefore the parents may have grave reasons for refusing their permission, if for example, the marriage would cause scandal or dissension or would lead to family disgrace but on the other hand the child may have even more serious reasons for the marriage, e.g. the danger of incontinence. In this case the parents would be acting unreasonably in refusing their consent. Hence the pastor should weigh all the circumstances concerning both child and parents. He should consider the age of the parties and the customary age when marriage is contracted in the particular locality. Whether the minor is marrying a Catholic or non-Catholic. If a Catholic, is the Catholic faithful in the practice of his religion. Whether there is a vast difference of age between the couple. How long they have known each other. The pastor should likewise keep in mind whether there is pregnancy present, concubinage or danger of habitual sin or other grave spiritual dangers if the marriage is not permitted. Reasons of this kind are usually sufficient to allow the marriage even against the will of their parents. Reasons listed on the part of the parents in refusing their consent could be that the marriage would cause scandal; the parents would suffer disgrace or a great material loss; or that the other party to the marriage is a drunkard, a gangster or a convict or an atheist; or one who is lazy and incompetent and incapable of supporting a wife and family. If the pastor judges that the parents are unreasonable in their refusal to give consent after mature consideration he should try to urge them to give their consent. But if they still refuse, he may proceed with the marriage without previously consulting the

Ordinary. This right is given to him by Canon 1034. This Canon states that the pastor must consult the Ordinary only if the parents, while knowing of the marriage, reasonably refuse to give consent. If they are unreasonable in their opposition there is no reason to consult the Ordinary. If however, the parents threaten a civil lawsuit against the pastor if he proceeds in such an instance, authors say the pastor should then consult the Ordinary and abide by his decision. The pastor must never urge the minors to marry against the unreasonable opposition of their parents.

If after all the investigation is done, there still remains a doubt as to whether the minors or their parents are right, the pastor is bound to consult the Ordinary; for in case of doubt the presumption favors the parents. The basis for this presumption is the reverence due to parental authority.

An interesting point to be observed here is that a person under twenty one years of age who is about to contract marriage for a second time, is not bound by the prescript of Canon 1034. In this instance the minor is already emancipated from parental authority and therefore is no longer a minor in the sense of Canon 1034. After a child's first marriage he or she is emancipated.

IV. The Ordinary: Marriage of Minors

Now we come to the portion of this paper dealing with the Ordinary's part in the marriage of minors. As has been noted previously in this paper the Ordinary must be consulted prior to the marriage of minors in some cases (where the parents do not know of the marriage or where parents are reasonably opposed). Why, we might ask should the Ordinary be consulted? The first juridic reason is that Canon 1034 explicitly obligates the pastor to consult the Ordinary in the cases listed, and the reasons for this are manifold. Firstly, the Bishop is the Ordinary and immediate pastor of the diocese entrusted to him, and he has the right and duty to govern this diocese in all spiritual and temporal matters. He is the divinely appointed guardian of Faith and Morals. And in the case of judging whether minors should be given permission to marry or not, the Ordinary occupies an objective position and has a wider knowledge of the effects this permission or refusal will have on the diocese at large. In demanding that the pastor consult the Ordinary the Church shows in a concrete way Her high regard for the

God-given authority of the parents. For before the Church is willing to acknowledge as lawful an action contrary to the will of the parents, she deems it necessary that the higher authority of the Local Ordinary be consulted. Another reason is that the minors themselves as well as their parents will ordinarily be unknown to the Ordinary; hence there is complete impartiality of judgment. Another reason is that the authority and dignity which the Ordinary enjoys may persuade the minors to defer their marriage to another time. Uniformity of policy is another good reason why such cases should be referred to the Ordinary.

According to Canon 198 the term *Ordinarius Loci* can refer to a number of persons and is not necessarily restricted to the residential Bishop of the Diocese, e.g., Vicar General, Prefect Apostolic, the Abbot *nullius*, etc.

And according to Canon 199 the Bishop may delegate ordinary power to some other priest, ordinarily one connected with the Curia, such as the Chancellor. Moreover some think that the Bishop should delegate the judgment of such cases to another since disputes and resentment often arise over them and it would seem more fitting that the Bishop himself be not involved in all of this. When possible the parties, parents and minors alike, should appear at the Curia building in order that the one to judge the matter may obtain first hand information. Even then the pastor should send to the Ordinary a letter containing his opinion of the case, showing for example the effect which either the permission or denial of permission will have on his parish.

The Ordinary will apply the same basic principles which the pastor employed in order to determine whether the parental opposition is just or unjust. If the Ordinary judges that the parental dissent is unreasonable, then he must permit the pastor to assist at the marriage. If on the other hand the Ordinary considers the parental objections as reasonable then he must forbid the marriage. In this case the Ordinary forbids the marriage not precisely on account of the lack of parental consent—as if this in itself were a kind of prohibitive impediment—but because of the reasons upon which the parental objections are based. In other words the Ordinary judges that the reasons that the parents have for forbidding the marriage are founded on a just and canonical cause and outweigh the reasons the child may have for entering marriage.—For example, if parents

oppose a marriage because their minor daughter is to marry a non-Catholic who is far her senior in age and whose moral life is questionable, these are just reasons for objecting to the marriage. And so if the daughter has no compelling reasons for entering the marriage, as she would have if there was danger of incontinence, or if there was a question of validating a civil marriage, then the Ordinary can refuse permission. It could happen that the Ordinary would almost be forced to allow a marriage even when parental opposition is just and reasonable, e.g., the nuptrients have no special reason for marrying while the parents have good reasons why they do not wish the marriage. The Ordinary after considering all the angles is about to decide to forbid the marriage. The parties, minors, then inform him that if permission is not given, they will marry out of the Church and will give up the Catholic Faith; they are set in their plans and will not accept the decision of their parents, their pastor or the Ordinary. In this case the Ordinary can permit the marriage as the lesser of two evils: on the one hand a grave sin of irreverence to their parents, on the other hand a sin of scandal, civil marriage and all its series of grave sins. All authors agree that the child is guilty of grave sin in contracting marriage against the just opposition of parents, and hence must be treated as a person who does not have the proper disposition for the reception of the Sacrament of Matrimony. Hence a confessor must refuse absolution to such a minor because he wilfully refuses to discharge a grave duty incumbent upon him.

In order that an Ordinary may validly and licitly forbid a marriage three conditions must be simultaneously verified. 1) The prohibition must concern a particular and definite marriage and not merely the marriage of minors in general. 2) The Ordinary must have a just cause for prohibiting the marriage, grave in itself and by reason of the circumstances of the case. 3) The prohibition of the minor's marriage can be only temporary, and will last as long as the just cause for which it was given continues to exist. For example, the Ordinary has forbidden a marriage because of parental opposition. Then the parents change their mind and give consent. The pastor without consulting the Ordinary may proceed to the marriage.

What becomes a more difficult problem is the permitting of marriages against the wishes of parents in the case of minors. As we

have seen, the Ordinary may permit a given marriage even though the parental refusal is reasonable, provided the prohibition of the marriage would lead to graver evils; here the Ordinary tolerates the violation of parental rights as the lesser evil. However, the principal difficulty in permitting marriage which the parents oppose arises from the civil law for all the States have laws concerning the marriage of minors. The civil law moreover is more exacting than the canon law on this point. The following might be given as a typical case. A minor decides to marry but the parents refuse consent. If the minor has cogent reasons why he should marry the parental dissent canonically considered must be judged unreasonable. According to the law of the Church then the party is free to wed. However, the civil law forbids a person of minor age to marry without parental consent. This is enforced by the State in requiring a civil license before the marriage may be celebrated, and the issuance of such a license in the case of minors is dependent upon the written consent of the parents or guardians. If one who is authorized to assist at marriages according to the law of the State actually officiates at a marriage when the parties have not obtained a license, he is liable to punishment. He can be fined and the State can forbid him to officiate at any marriages in the future. In our case the party cannot obtain a civil license since his parents will not give consent in writing. If the pastor goes ahead regardless, the dissenting parents may bring the matter to the attention of State officials. What should the Ordinary do in this case?

First it would be well to determine whether the Ordinary, the pastor and the contracting parties are obliged in conscience to obey the civil law in these circumstances. We say that the civil law in this case is unjust, for it is contrary to the law of the Church. Nevertheless the difficulty still remains as to how the marriage can be celebrated. Before advising the extraordinary means permitted by canon law the Ordinary should attempt to solve the difficulty by an appeal to the civil courts or by advising marriage outside the jurisdiction of the particular State. Sometimes redress can be had legally, e.g., appeal to the Probate Court of the county; in some places the Probate Court can confirm the nomination of a personal guardian for a minor over 14. This guardian can then give the consent necessary for a marriage license in spite of parental protests. Sometimes there is no way out of this dilemma from

the viewpoint of the State. Then the Ordinary can turn to the solution offered by Canons 1098 and 1104. Canon 1098 considers the celebration of a marriage before witnesses alone and Canon 1104 deals with the marriage of conscience.

Canon 1098 states an exception to the ordinary form of marriage. Therein the legislator decrees that if the pastor or the Ordinary or a priest delegated by either according to Canons 1095-1096 cannot be had, or if the parties cannot go to him without grave inconvenience, then the marriage even apart from danger of death, may be validly and licitly contracted in the presence of two witnesses, provided it can be foreseen that the difficulty of having an authorized priest will continue for a month. There has been much pro and con discussion about this point, but after it is all sifted it is certain that the Local Ordinary may employ Canon 1098 and permit the marriage of a minor to be celebrated before witnesses alone.

Then we have a marriage of conscience.—This is a marriage which is celebrated according to the form prescribed by law in Canons 1094-1095 but in such a manner that it may remain a secret known only to the contracting parties, witnesses, the assisting priest and the Ordinary. Permission for a marriage of conscience may be given only by the Bishop for grave reasons. It is a last resort for a difficult case. The best answer to our difficulty is probably Canon 1098 for these reasons. The pastor cannot be punished by civil law; in a marriage of conscience the pastor could be punished if the secret were discovered. In permitting the celebration of marriage before witnesses alone all the difficulties connected with a marriage of conscience are avoided and the parties are permitted to reside in their own locality; it would not be necessary for them to move to another locality.

V. American Civil Law: Marriage of Minors

And finally a few words in connection with American civil law and the marriage of minors. The States of the Union have also fixed a definite age for marriage, just as canon law has done, and the civil regulations are very similar to the law of the Church in most instances. At common law there was no requirement that parents or guardians consent to the marriage of their children who were under a certain age. If the male child was over 14 years of age and the female child over 12 years of age the marriage was

considered valid. Even without the consent of their parents or guardians their marriage was considered valid. In the year 1753 in England the famous Lord Hardwicke's Marriage Act was introduced and became law in England. By this act the marriage of minors was held to be invalid if entered into without parental consent. This, however, was changed subsequently so that parental consent or lack of it did not render the marriage invalid. The absence of parental consent according to the statutes of all the 48 States does not invalidate the marriage of minors. However, all the States of the United States have rulings whereby until a certain age has been attained by the minor the consent of his parents or guardians is necessary.

These statutes vary according to different States. Of the 48 States, 31 require the consent of parents or guardians for the marriage of any male under 21 years of age and for any female who has not completed her 18th year. This is required by statute in Alabama, Arizona, Arkansas, California, Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, and Wisconsin. By statute the age of parental consent is fixed at 21 for both men and women in Connecticut, Florida, Kentucky, Louisiana, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia and Wyoming. The legal age in Idaho, South Carolina, and Tennessee is 18 years for both sexes. New Hampshire requires the age of 20 years for males and 18 for females. The District of Columbia follows the majority of States in demanding the age of 21 for males and 18 for females. Georgia and Michigan have no statute law; however, in practice they require the age of 18 for females. Some states require the consent of both parents, while others accept the consent of one parent as sufficient. There is no uniformity in this and all of the States have different specific regulations. According to the laws of all the States a minor is emancipated by a first marriage and hence does not need parental consent for a second marriage in any of the 48 States. In some States the parent or guardian must apear personally at the licensing bureau and there testify that he consents to the marriage of a minor, but most of the States accept this consent in writing. The way in which this law is enforced

is that a marriage license is withheld from a minor who does not have his parents' consent. Licensing officials are punished severely if they issue a license to a minor without observing the formalities of law. The State also punishes those who officiate at such marriages. This is the only means the State employs for enforcement. The State does not declare that marriages contracted by minors without the knowledge and consent of their parents or guardians are void or voidable. If the minor is above the minimum age required by the law of the State for marriage, then regardless of whether parental consent is present or absent, the marriage is valid. Hence the parents or guardians have no right to sue for annulment of a marriage by their child when he is below the age of parental consent.

REGARDING A PROPOSED REFORM OF THE CALENDAR *

The proposal for a Reform of the Calendar, made by the Government of India, will be discussed by the Economic and Social Council of the United Nations (ECOSOC) during its 18th Session which opens on June 29th. On various occasions during the past thirty years plans for a Reformed Calendar have been discussed by the League of Nations. Very many plans were considered, but only one has survived, that of the World Calendar Association.** It is this plan that is being proposed by India. On previous occasions the sponsors of reform have been the Governments of various Christian States. Now, for the first time, the proposal is being made by the Government of a great country with a predominantly non-Christian population. This is a matter of some significance. It shows that the interest in, and desire for, a reform of the calendar is becoming more widespread. One can well understand that India, which suffers from the confusion due to a multiplicity of calendars,

* The present is a reproduction of a copy of the official English translation of an article on Calendar Reform, which appeared in *L'Osservatore Romano* under date of June 28, 1954, and which copy was transmitted to *The Jurist* by the courtesy of His Excellency, the Most Reverend Amleto G. Cicognani, D.D., Apostolic Delegate in the United States.

** It is not without interest to recall that this scheme was devised by a Catholic priest, Abate Marco Mastrofini. The book in which he described the plan was published in Rome in 1834.

should desire to introduce uniformity in this important matter. It is interesting that the Indian Government should favour the World Calendar, which is substantially our Gregorian Calendar, with some modifications.

Our Calendar, as far as the length of the year and the division into months is concerned, is, indeed, neither Gregorian nor Christian in origin. The length of the months remain today exactly as they were fixed by Julius Caesar, except that Augustus is said to have taken one day from February to add to the month which he named after himself. The names of the months have remained unchanged since the time of Julius Caesar, except that, after his time, Quinctilis and Sextilis became July and August, respectively. In early Roman times March was the first month of the year, but already before Julius Caesar the Roman year began on January 1st.

Caesar introduced a leap year every fourth year, in order to adjust the length of the calendar year to that of the solar year. This adjustment was not exact. By the sixteenth century the calendar year was several days ahead of the solar year. Pope Gregory XIII set up a Commission to study the matter and to devise a way to correct this error. At the same time he founded the Specola Vaticana, so that astronomical observations might be made to demonstrate the need for a reform of the Calendar. Pope Gregory, in his Calendar Reform Bull of 1582, decreed that ten days should be dropped in that year, in order that the Spring equinox should be brought back to March 21st. He prescribed a new Leap Year rule, which is so exact that the calendar year will keep closely in step with the solar year for thousands of years to come. The Bull also decreed new rules for computing the date of Easter, based on fresh calculations of the relation between the lunar month and the solar year.

There have been some attempts to improve on the Gregorian leap year rule, so as to make the adjustment of the calendar year to the solar year more exact. For all practical purposes such alterations are totally unnecessary. They suffer, moreover, from a serious defect, in that they lack the simplicity which is such a great advantage of the Gregorian rule. In fact, the framers of the new "World Calendar", recognising the excellence of the Gregorian rule, leave it quite unchanged.

The new scheme proposes: 1) to adjust the lengths of the months so that the year shall consist of four equal quarters, and 2) to count the last day of the year—and, in leap years, the day after June 30th—as extra days not belonging to any week or month. It follows that any particular date would be on the same day of the week each year.

It is not quite correct, if we wish to be precise, to call the proposed reform " a reform of the Gregorian Calendar ". What would be altered are not the changes made by Pope Gregory but the length of the months which we have inherited from Pagan Rome, and the sequence of the weeks, which will be altered by the introduction of intercalary days. This distinction is, however, quite commonly ignored. Many of those who advocate the change speak of the defects and inconveniences of the " Gregorian Calendar " (for example, the unequal quarters) as if they were the result of Pope Gregory's work. A recent example of this attitude occurs in an article in a widely-read periodical by an Indian writer, Dr. H. A. Ali, of the University of Hyderabad. Dr. Ali writes (Journal of Calendar Reform, April, 1954, page 24): " The answer to the question as to how the Christian year began to commence with the first of January is very simple. Nearly 1600 years after Christ came the vicegerent of God on earth, known as Pope Gregory XIII. He was a very powerful Pope and he wanted the new year rejoicings to be close to the date on which the nativity of Christ was celebrated. Since the birth of Christ on December 25th is not an established fact, he would have been wiser to have brought the Nativity celebrations closer to the vernal equinox. But the Spring festival was a pagan custom and Christmas had already become associated with snow and hearth-fires. So instead of changing the official birthday of Christ, the New Year was shifted from March, the time when all Nature rejoices, to January, a period when Nature is asleep. And Europe quietly obeyed the Pope in 1582, when the Renaissance had been preaching its gospel of intelligence and freedom for 200 years! " It is perhaps sufficient comment on this remarkable distortion of history to remind the reader of the fact that from before the time of Julius Caesar, who flourished more than 1600 years before Pope Gregory, the year began on January 1st. It is true that in the Middle Ages in various parts of Europe a custom grew up of dating the year " from the Incarnation " (March

25th) or "from the Nativity of Our Lord" (December 25th). However, before the time of the Gregorian Reform, January 1st had again become, in most of Europe, the beginning of the year.

We can, of course, excuse an Oriental writer for not being familiar with the history of Western civilization. Others, however, who might be expected to know better, write in similar terms, and it is time that the matter should be made clear.

With regard to the attitude of the Catholic Church towards proposals for a reform of the Calendar, there are some who think that the Church must necessarily be opposed to all attempt at change. This belief is, in fact, not correct. I think it is true to say that the Church has no reason to oppose in principle a modification of the present Calendar. If there were a general desire for reform, motivated by serious requirements of the economic and social life of the peoples of the world, the Catholic Church would not fail to consider the question, provided, naturally, that certain conditions which She Herself cannot overlook, are observed.

Closely connected with Calendar reform is the question of fixing the date of Easter. The sponsors of the World Calendar Plan state explicitly that they do not attempt to deal with the Easter question. They realize fully that that is a matter which pertains to the ecclesiastical authorities. However, it cannot be denied that the desire for a fixed date for Easter is becoming more widely felt. In the early centuries of the Church there were long and often very bitter conflicts over the date of Easter, until a solution was reached in the Council of Nicea (A.D. 325). Hence, it is, indeed, a very venerable tradition that places Easter on the first Sunday after the full moon after the vernal equinox. The Church, however, which made that rule would also, undoubtedly, have the power to alter it, if there were grave reasons which would make such a change advisable.

Rev. Daniel J. K. O'Connell, S.J.

Director of the Vatican Observatory

Decrees and Decisions

CANONICAL

FAST FOR EASTER VIGIL SERVICE

The Holy Office, asked whether the *Ordinationes* of the Sacred Congregation of Rites concerning the eucharistic fast in connection with the celebration of the restored Easter Vigil service were to be considered still in force after the promulgation of the Constitution *Christus Dominus*, after conferring with the Sacred Congregation of Rites, answered: (1) priests who are going to celebrate the Mass of the Easter Vigil at midnight, and the faithful who are going to receive Holy Communion at that Mass are bound to observe the rules of fasting laid down in Can. 808 and Can. 858 § 1; (2) If the Mass of the Vigil in some particular case is celebrated prior to midnight, according to n. II, 4 of the *Ordinationes* the norms of the Constitution *Christus Dominus* and the Instruction of the Holy Office are to be observed.

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PROSCRIPTION OF A BOOK

The Holy Office has placed upon the Index of Forbidden Books the one entitled: Niko Kazantzakis—*Ὁ τελευταῖος πειρασμός—Die Letzte Versuchung.*

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CHAPLAINS OF THE SEA

The Sacred Consistorial Congregation has published norms and faculties for the chaplains and directors of the Apostleship of the Sea. It has likewise published norms and faculties for the priests who act as chaplains to those who are traveling by sea and for their directors.

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BLESSING OF SEMINARY

The Sacred Congregation of Rites has published a formula for the blessing of a new seminary. This blessing is to be given by

the Rector or some other priest delegated for the purpose by the Bishop, unless the Bishop prefers to do it himself.

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TERRITORIES ASSIGNED

The Sacred Congregation for Extraordinary Ecclesiastical Affairs has announced the reassignment of certain territories in the Caribbean among the various Nunciatures and Delegations. The Bahamas continue to be subject to the Apostolic Delegate in the United States. Bermuda was transferred in 1953 to the Apostolic Delegate in Great Britain.

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SECULAR

IMMUNITY OF CHARITABLE INSTITUTIONS

The State of Washington is another which has joined the trend toward abandonment of the doctrine which granted tort immunity to charitable institutions. While previously the Supreme Court of that State had held that a charitable hospital was not liable for the negligence of its personnel, unless it could be shown that it had been negligent in the selection and retention of such personnel, now the Court has overruled those precedents, at least insofar as they are applicable to a paying patient. The Court further stated that at the present time twenty-six States grant immunity to charitable institutions, either completely or in certain cases. Twenty States, it found, deny immunity, and five are not clearly on either side of the line.

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RELIGIOUS CORPORATION AND MINIMUM WAGES

The Court of Appeals for the Seventh Circuit has held that a religious corporation may not rely upon the First Amendment to escape paying employees in its printing plant which produced materials of which half were sold outside of the state the minimum wages prescribed under the Fair Labor Standards Act. The Court held that the guarantees in the Constitution of freedom of religion were neither applicable to the case nor violated by forcing adherence of the defendant to the terms of the Act. Religion itself,

the Court said, is not commerce, but it does not follow that a religious corporation may not be engaged in " commerce " as defined in the Act. To apply the Act did not " prohibit the free exercise of religion " by the defendant, nor did it lay a flat tax on the privilege.

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CHURCHES AND ZONING LAWS

The Supreme Court of Indiana was called upon to decide whether the constitutional guarantees of freedom of religion were violated by the application of a zoning ordinance which required a specified amount of off-street parking area in connection with a church when such application precluded erection of the church. The Court agreed that the requirement that the church be set back from the street a specified distance was not arbitrary or capricious, and found that it would not prevent erection of the church. The off-street parking requirement, however, would prevent erection of the church so the Court held that it violated the guarantees of freedom of religion. The constitutional right to freedom of worship and assembly, it held, outweighed any benefit which the municipality had a right to secure under its police powers. There were three other churches in the neighborhood, erected prior to the zoning ordinance, and these caused on-street parking.

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CHARITABLE DONATIONS BY CORPORATIONS

The Supreme Court of New Jersey has held that under modern conditions, even apart from statutory provisions, a corporation is not acting *ultra vires* in making a reasonable charitable contribution from corporate funds. The Court stated that " modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members " of the community. It went on to say: " But even if we confine ourselves to the terms of the common-law rule in its application to current conditions, such expenditures may likewise be readily justified as being for the benefit of the corporation; indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system."

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GIFT TO RETIRED MINISTER

The Court of Appeals for the Third Circuit has held that an "honorarium" paid by a church congregation to a retired minister "as pastor emeritus" is not taxable income but a gift excludable from gross income under I.R.C. § 22 (b) (3). The payment was made out of love and affection for the retiring pastor and there was no vested interest in future payments, since the church was free to halt the payments at any time. The Court quoted with approval from *Schall v. Commissioner*, 174 F. 2d 893: "the mere use of the terms 'salary' and 'honorarium' do not convert [a] gift into a payment for services."

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OBSCENE BOOKS

The Court of Appeals for the Ninth Circuit, adhering to the general test it laid down in *Burstein v. U. S.*, 178 F. 2d 665, that a book is obscene when it is "dirt for dirt's sake," upheld the confiscation by customs officials at the port of entry of two books on the ground that they were obscene under 19 U. S. C. A. § 1305 (a). To the argument that the books had literary merit because they truthfully described the present base status of society the Court replied: "It is no legitimate argument that because there are social groups composed of moral delinquents in this or in other countries, that their language shall be received as legal tender along with the speech of the great masses who trade ideas and information in the honest money of decency." Under the statute, it is true, a book must be judged as an integrated whole and "literary merit" must be recognized, but the Court said that if an incident integrated with the theme or story "is word-painted in such lurid and smutty or pornographic language that dirt appears as the primary purpose rather than the relation of a fact or adequate description of the incident, the book itself is obscene."

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NEGLIGENCE OF CHILD

The New York Appellate Division has ruled that one cannot say as a matter of law that a nine-year-old child is guilty of contributory negligence for running into the street between parked cars while playing. Instead, the jury must be allowed to determine

from the child's mental capacity and maturity whether he is capable of and indeed guilty of contributory negligence. One judge, dissenting, said that any New York City child should know the dangers of running into the street between parked cars without looking.

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INJURY TO BUSINESS INVITEE

The Supreme Judicial Court of Massachusetts has held that since all that plaintiff had been able to show was that he had slipped on a stairway, that there was a banana peel on one of the steps, and that it was dark, he had by no means showed that the proprietor of the place was responsible for the peel being there or that it had been there long enough for him to know about it, and plaintiff was not, as a matter of law, entitled to recover.

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NEGLIGENCE IN LEAVING AUTO

The Supreme Court of Illinois has held that when the employee of a taxicab owner left it unattended with the key in the ignition and it was stolen and the thief, fleeing, struck with it the automobile of another there was a prime facie case of negligence. While the theft was an intervening force in the chain of causation, the Court ruled that it could not say that, as a matter of law, the intervening force was without the range of reasonable anticipation and probability. There is a statute in Illinois which provides: " no person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key . . ."

The Supreme Court of California, on an identical factual situation, has held that the car owner's duty to exercise reasonable care in the management of his car does not include a duty to protect a third party from the negligent driving of a thief. There was a municipal ordinance providing that keys should be removed from unattended noncommercial vehicles, but it also provided that it should not be admissible as evidence in any civil action. As to the " chain of causation " problem, the Court indicated that California law would not consider that the thief's negligent driving broke the chain.

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NO CRIME AGAINST WIFE'S PROPERTY

The County Court of Kings County, New York, dismissed an indictment returned against a husband for larceny of his wife's property on the ground that the common law rule that neither spouse can commit a crime against the property of the other is still the law of New York despite the fact that Married Women's Acts secure a separate property right in a wife. The basis for the rule, said the court, is found in the "unity of husband and wife." Further, a criminal statute is to be construed strictly and the New York larceny statute does not specify that marital larceny is possible.

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INJURY TO HUSBAND-FATHER

While the District of Columbia has permitted a wife to file a separate action for negligence of a third person resulting in personal injuries to the husband-father, the Supreme Court of Arizona has held that a wife and child do not have actions separate and apart from that of the husband-father in cases of ordinary negligence. The husband had failed in a common law action against his employer based on negligence. The wife and child brought their action based on the same negligence.

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LIBEL BY WILL

The Supreme Court of Oregon has held that an action for libel against the decedent's estate may be maintained by the victim of language in a will which is libelous per se. Cases holding that there is no such right of action relied upon the ancient maxim that a personal action dies with the person, but the Court held that in libel by will the libel is not published until after the death of the testator and therefore the tort is not committed during his lifetime.

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TESTAMENTARY RESTRAINT ON MARRIAGE

When the Appellate Division, First Department, in New York reviewed the decision of the Surrogate mentioned in our April issue, p. 223, it found that the Surrogate had but skirted the difficulty in the case by considering the grandson, holder of the power of appoint-

ment, a mere conduit through which the property passed. The Appellate Division, instead, held the restriction effective as to the grandson, but not as to the great-granddaughter who was the donee of the power, so the restriction did not apply to her.

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LOTTERIES

The Criminal Code of the United States prohibits, in Sec. 1304, the broadcasting of " . . . any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . ." The Federal Communications Commission proceeded to adopt regulations designed to prevent the broadcasting of " give-away " shows by refusing to grant or renew licenses of stations which broadcast programs of a kind forbidden by the aforesaid Sec. 1304. The United States Supreme Court, however, refused to uphold this ban on " give-away " shows. The Court found that there are three essential elements of a lottery: (a) distribution of prizes (b) according to chance (c) for a consideration. While the first two elements were present, the Court found no consideration in the " give-away " shows.

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DIVORCE—ALIMONY

The New York Appellate Division has declared that a wife can not require resumption of support payments under a separation agreement providing that the former husband shall make support payments to the wife " until she shall remarry," when she remarries and the latter " marriage " is annulled. The Court spoke of " round-robin " Nevada divorces and contemplated remarriages. It found that the wife knew the tenuous character of her remarriage and that her second husband might not be legally divorced from his former wife. In fact, she used this very ground in annulling her second " marriage." The Court stated: " It makes neither sense nor reason nor is it good policy that the husband should stand ever ready to support the wife, insuring her maintenance should she, with full knowledge of the facts, but confused or misled by the vagaries of matrimonial law, discard or be discarded by a second husband because of legal infirmities in the remarriage."

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DIVORCE—" COOLING OFF PERIOD "

The Supreme Court of Illinois has held unconstitutional Illinois' so-called sixty-day " cooling off period " divorce law. The legislation was enacted in 1953. It provided that before filing a complaint for divorce, separate maintenance or annulment, a litigant had to file a statement of intention to file such a suit at least sixty days before actually filing it. During this period the trial judge was required to request the parties to come to him for a conference to determine whether there was any basis for reconciliation. The Court held that the imposition of this period of delay violated the provision of Illinois' Constitution that " every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation . . ." Noting that divorce is purely a statutory action and that it could be eliminated entirely by the legislature, the Court said that a state may not attach unconstitutional conditions to the exercise of a right even though the right itself exists entirely at the pleasure of the state. The statute was considered unconstitutional also on the grounds that it violated the doctrine of separation of powers by placing the judge in the position of a mediator with no litigious subject-matter before him to decide. " The function here required of a judge is too remote from normal judicial duties to be sustained," said the Court.

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DIVORCE—JURISDICTION

The New York Appellate Division denied a wife's motion for summary judgment in New York on an award of lump-sum alimony in Vermont on the ground that the Vermont judgment was not entitled to " full faith and credit." The reason that it was not so entitled was that it was rendered on an amended action to which the husband, domiciled in New York, had not been properly made a party. The original appearance of the husband, by a Vermont attorney, was in response to the wife's original action for divorce from bed and board. The attorney was unable to reach the husband when the case came to trial. Giving five days notice to the attorney, the wife amended her action to one for absolute divorce. The very day the amendment was allowed the court allowed the husband's attorney to withdraw from the case, heard the wife's case and

awarded the lump-sum alimony. Since the Vermont court did not have jurisdiction of the husband the New York court, therefore, held that the divorce decree was void and the alimony fell as part of the whole decree.

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TRUST FOR CHARITABLE USES

An Illinois court has held that a testamentary charitable gift over to three English hospitals and a hospital fund was not defeated by the passage of the National Health Service Act in 1946, bringing "socialized medicine" to England. The Court said that medical and hospital care are not any the less charitable functions because they are performed by a government. The hospitals were still operating in the same communities, and this was the essence of the gift, and the fact that the funds would pass to a board different from that which the testator might have intended did not affect the use of the funds. Rhode Island took a different view where the testator had imposed specific purposes upon the funds and had provided for an alternative gift in the event of failure of his gift to the hospital.

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Book Reviews

NEUESTE KIRCHENRECHTS-SAMMLUNG von Suso Mayer, O.S.B. Erster Band, 1917-1929. Verlag Herder, Freiburg, 1953. Pp. 566.

It is always useful to have at hand a volume containing the definitive responses of the Sacred Congregations and the authentic decrees of the Pontifical Commission for the Interpretation of the Code of Canon Law. Fr. Mayer's collection of responses and decrees is such a volume. As far as it goes, its utility is unquestioned but it is no better than several other volumes which contain about the same material. The works of Coronata, Bouscaren, Sartori and others could be mentioned in this regard.

Fr. Mayer's collection is one of several projected volumes. The complete series will cover all canonical matter arising since the promulgation of the Code.

Anyone who prefers the German language instead of the vernacular will find this work entirely satisfactory. It is questionable, however, whether this language will find many devoted readers in the United States. It will always be better to study the responses and decrees of the Holy See in their original Latin.

An appendix contains an index of Pontifical documents from 1917 to 1929. A servicable index of topics is provided.

DE BONIS ECCLESIAE TEMPORALIBUS auctore G. Vromant, C.I.C.M., (Scheut). Editio tertia recognita. Museum Lessianum Section Théologigue, No. 19. Éditions de Scheut, Bruxelles, Éditions Desclée de Brouwer, Bruges-Paris, 1953. Pp. xiii - 329. Prix 180 fr.

One of the deservedly trusted canonists is Fr. Vromant. His efforts to expound Canon Law especially in the interest of missionaries have elicited the constant praise of reviewers and the settled assurance of readers. The present volume on ecclesiastical property is no exception to the general excellence of Fr. Vromant's contribution to the study of Canon Law.

Of particular interest in this volume is the plan and hope of religious communities to have their missions self-supporting. The author states that no mission is completely established until the works of religion are locally supported in an adequate fashion. Thereafter foreign subsidies should be used to further additional missions. In this regard, attention is called to the contributions religious houses and provinces are called upon to make to the general curia for the general missionary purpose of the religious community. In some constitutions of religious congregations a suitable and exact amount is definitely stated.

In the matter of acquiring ecclesiastical property of various kinds, the author agrees with most canonists on fundamental and subsidiary methods. However, from the lien of a pension he excludes parishes established without an immediate dowry. Such parishes, it is claimed, are not benefices in the proper sense of the term. There is disagreement on this point.

Another point on which the author is in disagreement with other canonists is the validity of acts of a religious Superior who neglects the canonical requirement of consultation. In support of his position, Fr. Vromant really adduces no new or better arguments so that his discussion is not productive of any advance in furthering the mild interpretation of canon 105, 1°.

The index is satisfactory but there is no separate bibliography. Sufficient annotation, however, to the separate canons can be found in the footnotes.

LIVRES ANCIENS DE DROIT D'ORIGINE ÉTRANGÈRE IMPRIMÉS AUX PAYS-BAS. Bibliothèque de l'Université d'Amsterdam, Amsterdam, Pays-Bas, 1953. Pp. viii-72.

This is an interesting catalogue of books printed in the Low Countries. The occasion for publishing this catalogue was a meeting of scholars interested in the history of law. Only books directly connected with the several departments of law are included.

Students of Roman Law will be pleased to learn of the large number of texts, translations and commentaries printed in the Low Countries. In addition to these there are also volumes of lectures and essays on the general aspects of Roman Law.

In regard to other systems of law, this catalogue is representative but not as extensive as it is in Roman Law. Some volumes on Natural Law, Commercial Law and Military Law are indicated as are a few books on Criminal Law. In almost every case, a reasonably complete description of the contents of the book is furnished.

The compilers of this catalogue are to be commended. Among these compilers may be mentioned Professor Feenstra whose lecture on "*interpretatio multiplex*" has recently been published. The example of the scholars of Holland in presenting this catalogue to the public may influence scholars of other countries to furnish bibliographical information to the world. Research in the history of law will be thereby facilitated.

The three separate indices should be mentioned. The first contains the names of authors, translators and commentators. The second is a list of geographical names. The third is a list of printers and editors. These are arranged alphabetically and in the order of cities where publication occurred.

WESTERN CANON LAW by R. C. Mortimer, D.D., Lord Bishop of Exeter. University of California Press, Berkeley and Los Angeles, California, 1953. Pp. 92. Price $2.00.

In 1951, the author of this book delivered a series of lectures on Canon Law at the University of California at Berkeley. These lectures are now published under the title of *Western Canon Law.*

Dr. Mortimer states these lectures are introductory only. This is true in regard to those who have spent some time in studying the history of Canon Law. But in regard to those who have the merest acquaintance with the subject at hand, more than a simple introduction is conveyed in these pages. The author traces clearly the development of canons and codices which governed the ecclesiastical world, including England, for many centuries. A knowledge of these matters is necessary for a proper grasp of the history of those centuries. A vote, then, of gratitude is due to the author for assembling and displaying notes of cultural and legal importance.

Two of the lectures contained in this book should be mentioned as particularly well constructed and informative. The first of these is entitled: "The Canon Law in England after the Reformation".

This lecture describes the losing battle of Canon Law at the hands of Parliament. Little by little many of the items and causes exclusively governed by Canon Law were made matters of dual and later of simple civil jurisdiction. Some of these changes the author applauds; others he has hopes of restoring to ecclesiastical control. In the same lecture, some laws are said to be obsolete although still of objective validity.

In the last lecture of his series, the author discusses the characteristics of Canon Law. Although his theories of government will not be accepted in Catholic Schools, Dr. Mortimer's general concept of the existence, character and purpose of Canon Law can readily be taken as proper. He is extremely careful to point out the relationship between the Church and the purpose of its law and the members of the Church who live under this law. It is rare indeed to see an explanation of and a justification for dispensations as the author provides. This lecture alone should have revealed to his audience the humanity and elasticity of disciplinary matters in Canon Law.

A short but suitable bibliography is included.

DISPENSATION FROM IRREGULARITIES TO HOLY ORDERS by James I. O'Connor, S.J., J.C.D. West Baden College, West Baden Springs, Indiana. Pp. 143.

A satisfactory work of some length dealing solely with dispensations from irregularities to Holy Orders has been missing from canonical libraries. As the author says, only a few pages here and there can be found in commentaries but no extended treatise is available at least in English. The field is better covered in relation to impediments to Holy Orders.

The author, a Professor of Canon Law at West Baden College, makes an excellent attempt to set forth the existence of irregularities and their dispensation. The device used is the division of the history of irregularities into three parts; the period prior to the Council of Trent, from this Council to the Code of Canon Law and, finally, from the Code to the present time.

Every section of this book deserves reading but, obviously, major attention will be focused on the modern law of dispensation. Even

after the promulgation of the Code some controversies remain. These are examined thoroughly by the author, who displays a zeal for lining up authors of various opinions. Some of this will be unnecessary for the student in the seminary but it ought to stimulate research among graduate students. The author exhibits sufficient courage in adopting and defending his own opinion although everyone knows some of these controversies will remain unsolved until the Holy See authoritatively decides them.

The bibliography is of the simplest construction. No effort has been made to separate sources from reference works. The index, too, could be improved by rearrangement of topics, persons and documents.

GESCHICHTE DES KIRCHRECHTS, Willibald M. Plöchl. Band I, Das Recht des ersten Christlichen Jahrtausends. Verlag Herold, Wien-München. Pp. 439.

There is at present a choice of several modern histories of Canon Law. This choice is now widened by the publication of Dr. Plöchl's history. The author is well known among canonists in the United States for he ably held for several years a professorial post at The Catholic University of America.

So far Dr. Plöchl's history considers the origin and development of Canon Law up to the great schism between the East and the West. This covers roughly about one thousand years. Two more volumes, to be published later, will complete this history. The whole work, then, should represent the latest word in research and compilation.

The general division of this volume is into books and chapters. The first book contains the history of Canon Law up to the Council of Nicea, the second from this Council to the Council of Trullo and the third continues the history to the schism in 1054. The author stresses significant developments in all these books. Naturally, since these developments are not uniform, unequal emphasis is displayed but the reader can easily see in each division where and how canonical institutes of whatever type arose and developed. Attention is particularly called in the first book to the chapter on the hierarchy and its jurisdiction. The second book contains several noteworthy chapters on things and persons. In this book, too,

the more important collections of laws are adequately described. The third book foreshadows the divergent thought of the East and West which ultimately resulted in schism. The chapters in this book are important not only in the History of Canon Law but also in the various departments of Theology.

The footnotes of Dr. Plöchl's book are sufficient for the general reader. But there are too many secondary sources used as references even though these references are for the most part reliable. The bibliography is satisfactory and well divided into separate categories. Some of the works, however, mentioned in the footnotes are not indicated in the bibliography. Special commendation is due the author for the several indices he has provided. These indices are really helpful.

ANNUAIRE DE L'ÉCOLE DES LÉGISLATIONS RELIGIEUSES. (Institut Catholique de Paris) II, 1951-1952. Letouzy et Ané, Paris, 1953. Pp. 101.

The second annual publication of the School of Law of Religious, a section of the Catholic Institute of Paris, maintains the same high standard set in its initial publication. This work had received high praise from readers, critics and from important officials in Rome. The same praise should be extended to the writers and editors of this second publication.

The present publication does not deal directly with the law for or of religious. It is rather the product of research fostered by the institute itself. Thus such diverse topics as the hierarchy of Orders in the Maronite Church and Hindou marriage are published in this year's annual. Some other topics are: the formation of the Orthodox Patriarchates, the situation of the Protestant Churches on the continent, and, an explanation of the parable of the unfaithful steward. Some of this has direct bearing on Canon Law. But all of these articles will not gain wide-spread interest among canonists. They are, however, because of their excellence, of some importance in the field of special research. Specialists will welcome this annual and eagerly await future publications.

EDWARD ROELKER

Chronicle

GENERAL

On April 22 the Xaverian Brothers celebrated the centennial of their arrival in America and Louisville, Kentucky.

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The Reverend Francis Borgia Steck, O.F.M., formerly a member of the teaching staff of The Catholic University of America, celebrated his Golden Jubilee as a Franciscan on May 4.

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Bishop William J. Hafey of Scranton died on May 12. Pontifical Requiem Mass was offered on May 18 for the repose of his soul by Archbishop John O'Hara, C.S.C., of Philadelphia.

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Choirs of boys' voices are to be trained in Buffalo to replace the choirs of women's voices in Church services.

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An Institute of Psychology has been established at St. John's University, Collegeville, Minn., to provide psychology workshops for clergymen of all faiths.

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Quincy College, conducted by the Franciscan Fathers, received full approbation as an accredited school by the North Central Association of Colleges and Secondary Schools.

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The personal papers of the late Bishop Francis Haas of Grand Rapids have been turned over to the Department of Archives and Manuscripts of The Catholic University of America.

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The United States issued its first postal stamp with a religious significance at a television ceremony in which President Eisenhower and Cardinal Spellman participated. It is an eight-cent stamp with the inscription "In God We Trust".

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The Catholic Church of America and particularly The Catholic University of America have been greatly commended in a *Saturday Evening Post* article for their great work in racial integration.

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Monsignor Howard Carroll, General Secretary of the National Catholic Welfare Conference, has been appointed representative of the Bishops of the United States to the Holy See's Supreme Council on Emigration.

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Monsignor Jesse Gatton has been named Vicar General of the Diocese of Springfield, Illinois, by Bishop William O'Connor.

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The Reverends James Macelwane, S.J., and Theodore Hesburgh, C.S.C., were named by President Eisenhower for memberships on the National Science Board of the National Science Foundation.

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On May 29, His Holiness Pope Pius XII solemnly proclaimed Pope Pius X a Saint. The crowd assembled before St. Peter's to hear his proclamation was the largest crowd ever to assemble there.

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The Most Reverend Emmanuel Suarez, O.P., Master General of the Dominican Order, and his secretary, Reverend Ameliano Martinez, were killed in an automobile accident near Perpignan, France.

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DIGNITIES

The Right Reverend Clarence Issenmann, Vicar General of the Archdiocese of Cincinnati, was named Auxiliary Bishop to Archbishop Karl J. Alter of Cincinnati.

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Bishop Allen J. Babcock, Auxiliary Bishop of Detroit, has been named Bishop of Grand Rapids.

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The Right Reverend Justin McCarthy of South Orange, New Jersey, has been appointed Auxiliary to Archbishop Thomas Boland of Newark, N. J.

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The Right Reverend Joseph Pernicone of New York has been named Auxiliary Bishop to Cardinal Spellman.

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The Very Reverend John J. Kelley and the Reverend Joseph F. Warnat of Pueblo have been named Domestic Prelates by Pope Pius XII. Four other priests of the diocese, namely, the Reverends Francis Faistl, Peter Maas, George Holland, and Elwood Voss, have been named Papal Chamberlains by His Holiness.

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Five priests from the Diocese of Springfield, Illinois, have been promoted to the rank of Domestic Prelate. They are: the Reverends Thomas E. Cusack, F. F. Formaz, Michael Enright, Daniel F. Daly, and Timothy M. Maloney.

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A Maryknoll Missioner, Reverend Joseph A. Sweeney, has been chosen as "Man of the Year" by the New Britain Press Club.

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The Reverend Lucius F. Cervantes, S.J., has been awarded a Ford Foundation Fellowship at Harvard University for sociological studies in family life problems.

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The Reverend Alexander Wangler of San Antonio has been named Papal Chamberlain.

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The following Papal Dignities were received in the Diocese of Amarillo. The Right Reverend Francis J. Pokluda, V.G., V.F., and the Right Reverend John A. Steinlage, V.F., were promoted to the rank of Prothonotary Apostolic. The Very Reverend Thomas D. O'Brien, V.F., the Reverend Bartholomew O'Brien, and the Reverend Wilfrid F. Bosen were named Domestic Prelates. The Very Reverend Archibald M. Bottoms, J.C.D., Chancellor, and the Reverend Leroy T. Matthiesen, Litt.M., were appointed Papal Chamberlains.